80-1301

Office-Supreme Court, U.S.
FILED
JAN 30 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH A. RUSS, JAMES WHIPPLE, and THE COVELO INDIAN COMMUNITY OF THE ROUND VALLEY INDIAN RESERVATION,

Petitioners,

v.

RICHARD E. WILKINS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Art Bunce, *Counsel of Record*
KARSHMER & BUNCE
333 S. Juniper St., Suite 105
Escondido, California 92025
Telephone: 714-489-0329

Bruce J. Friedman
George Forman
David Rapport
Lester J. Marston
CALIFORNIA INDIAN LEGAL SERVICES
P.O. Box 488
Ukiah, California 95482
Telephone: 707-462-3825

James F. King, Jr., Of Counsel
P.O. Box 428
Willits, California 95490

Counsel for Petitioners

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOSEPH A. RUSS, JAMES WHIPPLE, and THE COVELO INDIAN COMMUNITY OF THE ROUND VALLEY INDIAN RESERVATION,

Petitioners,

v.

RICHARD E. WILKINS, et al.,

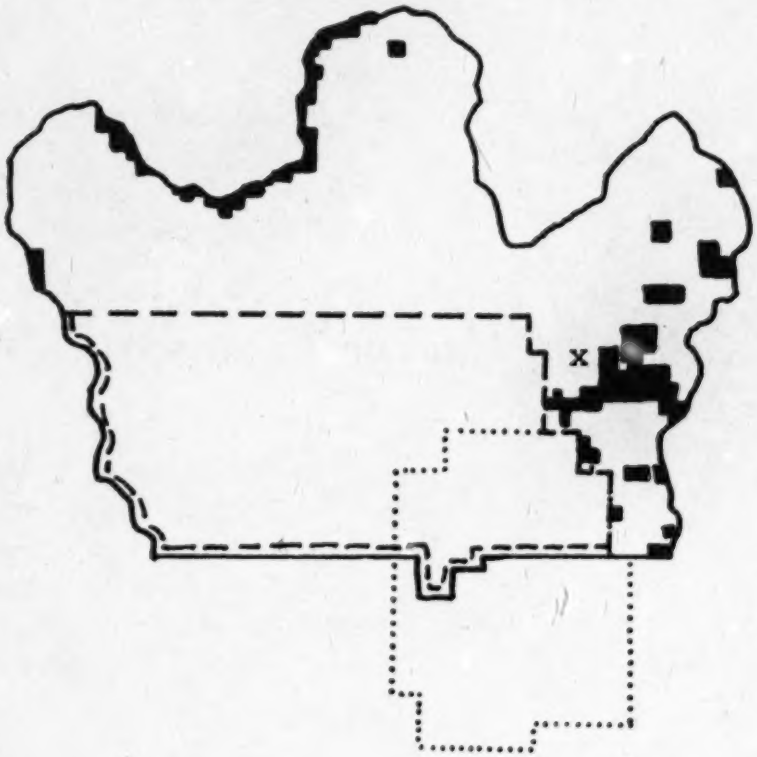
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joseph A. Russ, James Whipple, and the Covelo Indian Community of the Round Valley Indian Reservation hereby respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 1, 1980.

ROUND VALLEY INDIAN RESERVATION

1 inch = approximately 6 miles



1858 Secretarial Order .....

1873 Statutory Boundary ———

1890 Unopened Lands - - - - - -

1947 Restored Lands ▬▬

1973 Situs of Kill x

QUESTION PRESENTED

Whether Congress intended to constrict the exterior boundary of the Round Valley Indian Reservation in enacting the Act of October 1, 1890 (26 Stat. 658, ch. 1271) to exclude the approximately 100 square miles, expressly included within the exterior boundary described in the Act of March 3, 1873 (17 Stat. 633), which the 1890 Act made available to non-Indian settlement and of which availability only 2 non-Indians initially availed themselves.

PARTIES

The parties to this proceeding are Joseph A. Russ; James Whipple; the Covelo Indian Community of the Round Valley Indian Reservation; Richard E. Wilkins, in his capacity as Game Warden of the California Department of Fish & Game; and E. C. Fullerton, in his capacity as Director of the California Department of Fish & Game.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	iii
PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	6
I. Even though this Court has developed a body of substantive law regarding whether Congress intended certain statutes to alter the boundaries of Indian reservations, the present case presents important and novel questions in this regard not yet answered by this Court	6
II. The Court of Appeals misapprehended or misapplied this Court's teachings in *Rosebud* and *DeCoteau*	10
III. The increased difficulty of law enforcement on the land opened by the 1890 Act justifies issuance of the writ	16
CONCLUSION	18
APPENDICES	
A. Russ v. Wilkins, 624 F.2d 914 (9th Cir., 1980)	19
B. Russ v. Wilkins, 410 F. Supp.579 (N.D. Cal., 1976)	57
C. Judgment	67
D. Order Denying Rehearing	68
E. Act of October 1, 1890, c. 1271, 26 Stat. 658	69

TABLE OF AUTHORITIES

Cases:	Page
Cornell v. Coyne, 192 U.S. 418 (1904)	11
DeCoteau v. District County Court, 420 U.S. 425 (1975)	passim
Leavenworth, L. & G. Railroad Co. v. U.S., 92 U.S. 733 (1876)	15
Mattz v. Arnett, 412 U.S. 481 (1973)	6, 7, 9
Menominee Tribe v. U.S., 391 U.S. 404 (1968)	17
Missouri, Kansas & Texas Railway Co. v. Roberts, 152 U.S. 114 (1894)	15
Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976)	16
Morris v. Hitchcock, 194 U.S. 384 (1904)	13
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976)	11
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	10
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)	passim
Russ v. Wilkins, 410 F. Supp. 579 (N.D. Cal., 1976)	passim
Russ v. Wilkins, 621 F.2d 914 (9th Cir., 1980)	passim
Seymour v. Superintendent, 368 U.S. 351 (1962)	6, 7, 9
U.S. v. Erickson, 478 F.2d 684 (8th Cir., 1973)	14
U.S. v. Mazurie, 419 U.S. 544 (1975)	13
U.S. v. Wheeler, 435 U.S. 313 (1978)	13
Washington v. Confederated Tribes of the Colville Reservation, _____U.S. _____, 65 L.Ed.2d 10 (No. 78-649, June 10, 1980)	13
White Mountain Apache Tribe v. Bracker, _____U.S. _____, 65 L.Ed.2d 665 (No. 78-1177 June 27, 1980)	13

Statutes:

Act of April 4, 1864, c. , 13 Stat. 39 2

Act of March 3, 1873, c. 333, 17 Stat. 633 ..... passim

Act of February 8, 1887, c. 119, 24 Stat. 888, 25 U.S.C. §331, et seq. 4

Act of October 1, 1890, c. 1271, 26 Stat. 658 ..... passim

Act of June 18, 1934, c. 576, 48 Stat. 984, 25 U.S.C. §461 et seq. 4

Congressional Materials:

Senate Report No. 1522, 48th Cong., 2nd Sess., Feb. 27, 1885 ..... 3, 8, 11

House Ex. Doc. No. 33, 50th Cong., 1st Sess., Jan. 5, 1888 3

House Ex. Doc. No. 72, 51st Cong., 1st Sess., Dec. 20, 1889 4

Senate Report No. 2618, 58th Cong., 2nd Sess., April 26, 1904 ..... 4, 8

Congressional Record, vol. 39, December 19, 1904 11

Annual Reports:

Commissioner of Indian Affairs, 1858 2

Commissioner of Indian Affairs, 1872 2

Commissioner of Indian Affairs, 1889 3

Miscellaneous:

Attorney General of California, *History and Proposed Settlement of Claims of California Indians* (1944) 1

Green, Charles Lowell, *The Administration of the Public Domain in South Dakota*, South Dakota Historical Collection, vol. 20 (1940) 8

Kappler, Charles J., *Indian Affairs, Laws & Treaties*, (G.P.O., 1904, 1980) 1, 2

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 624 F.2d 914, and appears as Appendix A. The opinion of the District Court is reported at 410 F. Supp. 579, and appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was filed and entered on August 1, 1980. Petitioners filed a motion on August 14, 1980 to enlarge the time during which they could file a petition for rehearing and suggestion for rehearing in banc until and including September 15, 1980. By an order filed on August 28, 1980, the Court of Appeals granted this motion. On September 15, 1980 the petitioners filed such a motion and suggestion in the Court of Appeals. By its order filed on November 3, 1980 the Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing in banc.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pivotal statute, the Act of October 1, 1890 (26 Stat. 658, ch. 1271), is reproduced as Appendix E.

STATEMENT OF THE CASE

In the years immediately following the discovery of gold in California, the state's Indian population was reduced from approximately 100,000[1] to perhaps 17,000[2] by means

[1]Letter of Superintendent of Indian Affairs for California to Commissioner of Indian Affairs, May 11, 1852, 4 Kappler, *Indian Affairs, Laws and Treaties* (G.P.O., 1980), 1088, f.n. Hereinafter, "Commissioner" means the Commissioner of Indian Affairs unless otherwise noted.

[2]Attorney General of California, *History and Proposed Settlement of Claims of California Indians*, 19 (1944).

of "eviction, starvation, murder and disease."[3] To afford a relatively safe refuge to the Indians who survived by 1858, the Commissioner of Indian Affairs proposed that a remote and uninhabited round valley, surrounded by mountain ranges, well-supplied with game and timber, and located about 160 miles north of San Francisco, be set apart from the public lands to be an Indian reservation.

> I have seen nowhere in California a spot so admirably adapted for an Indian reservation as this. With a soil of extraordinary fertility, a mild and equable climate, an unlimited supply of every variety of timber and completely isolated by a belt of almost impassable mountains. . .
>
> *Annual Report of Commissioner*, 298 (1858).

The Commissioner formally established the reservation in the valley on November 18, 1858, but non-Indians intruded and seized so much of the valley floor that President Grant, acting under the authority of the Act of April 8, 1864,[4] attempted to confirm the valley's reservation status by his Executive Order of March 30, 1870.[5] This measure, too, failed to displace the squatters who, by 1872, grew even more "bold and insolent," holding nearly all of the valley floor and "clamor[ing] for breaking up the reservation and driving the Indians away."[6]

To remedy this situation, Congress enacted its Act of March 3, 1873 (17 Stat. 633, Chap. 333), by which Congress restored the southern two-thirds of the valley floor, about 12,000 acres, to the public domain *by express language*: "[certain described lands are] hereby restored to the public lands of the United States", directing that the proceeds of such sales be used to pay for the improvements and claims of settlers on the northern third of the valley floor so that

[3] *Id.*

[4] 13 Stat. 39.

[5] 1 Kappler, op. cit., 828.

[6] *Annual Report of Commissioner, 1872*, pp. 374-7.

they "shall be required to remove therefrom as soon as they shall be paid for . . . their improvements." To compensate the Indians of Round Valley for the loss of two-thirds of the valley floor, Congress added approximately 89,000 acres of mountainous land adjacent to the retained portion of the valley floor to the reservation. The 1873 Act purposely set the northern, eastern, and western boundaries of this reservation to be various branches of the Eel River, and Congress expressly guaranteed in the 1873 Act "the privilege of fishing in said streams."

This compromise measure failed to remove the non-Indian settlers from the reservation portion of the valley floor because they were required to leave only when paid for their improvements. Because the sale of the restored southern two-thirds of the valley floor did not yield enough funds, and Congress did not appropriate any funds, the squatters on the northern third of the valley floor were not paid, and they never left. By 1885 about 97,000 of the 102,000 acres of the reservation were firmly in the hands of non-Indians.[7] Court action and military action to dislodge them both failed.[8]

Based on a thorough review of the history and circumstances of this conflict, Senator Dawes' committee of inquiry issued a report[9] in 1885 on which was based a remedial bill which passed the Senate, but failed in the House in 1886. President Cleveland submitted a similar bill to end "the present extra-ordinary and disgraceful state of affairs" to Congress in 1888.[10] It also passed the Senate, but failed in the House. Undaunted, the President submit-

[7]Senate Report No. 1522, 48th Cong., 2nd Sess., Feb. 27, 1885, pp. 1-4; *Annual Report of Commissioner*, 1889, p. 67; *Russ v. Wilkins*, 624 F.2d 914, 916 (9th Cir., 1980).

[8]*Annual Report, 1889, supra*, at 67-69; *Russ, supra*, at 916.

[9]Senate Report No. 1522, *supra*.

[10]House Ex. Doc. No. 33, 50th Cong., 1st Sess., Jan 5, 1888.

ted the same bill to the next session.[11] This time, it passed and became the Act of October 1, 1890, on the construction of which this case turns.

Section 1 of this 1890 Act directed the part of the reservation on the valley floor to be allotted to Indians in 10-acre tracts, pursuant to the General Allotment Act.[12] A commission was to select a tract of mountainous land to be used exclusively for tribal purposes, such as grazing, wood-gathering, hunting, and fishing. Section 2 directed the commission to appraise the holdings of the trespassers and stated that their title would vest in the United States immediately upon payment or tender of the appraised value. Thus, unlike the 1873 Act, the 1890 Act provided for immediate removal of trespassers, and specifically authorized removal by "the military forces of the United States, if necessary." Section 3 directed the survey and appraisal of the mountainous lands not reserved by the commission for exclusive Indian use into 640-acre parcels for sale to the highest bidder at the appraised price. Section 4 directed the net proceeds of these sales to be placed in the U.S. Treasury to the credit of the Indians.

This sale of surplus unreserved lands occurred on April 19, 1894 and was spectacularly unsuccessful. For the 63,642 .57 acres offered for sale, there were only two bidders, and they bought only 1,223.43 acres.[13] For decades, the opened lands languished, and in 1947 the Secretary of the Interior, acting under the Indian Re-Organization Act of June 18, 1934,[14] restored to tribal ownership the 7531 remaining acres of land opened to non-Indian settlement by the 1890 Act for which no buyers could be found in 53 years.

[11]House Ex. Doc. No. 72, 51st Cong., 1st Sess., Dec. 20, 1889.

[12]Act of Feb. 8, 1887; 24 Stat. 388; 25 U.S.C. §331 et seq.

[13]Senate Report No. 2618, 58th Cong., 2nd Sess., April 26, 1904, p. 2.

[14]48 Stat. 984, 25 U.S.C. §461, et seq.

Petitioners Russ and Whipple are members of the Covelo Indian community of the Round Valley Indian Reservation. On April 15, 1973 they were hunting for and killed a deer for subsistence purposes on a parcel of land sold under the 1890 Act. Respondent Wilkins, as a Game Warden of the California Department of Fish and Game, cited them and confiscated the deer.

Russ and Whipple, asserting federal jurisdiction under 28 U.S.C. §1343(3) and 42 U.S.C. §1983, filed a civil action on December 19, 1973 in the U.S. District Court for the Northern District of California, seeking declaratory relief as to the present boundaries of the Round Valley Indian Reservation, an injunction to prevent respondents from enforcing the provisions of the California Fish and Game Code against them within those boundaries, and damages for the loss of the deer.

Relying for federal jurisdiction on 28 U.S.C. §§1331 and 1362, the Covelo Indian Community, a petitioner herein and a federally-recognized Indian tribe, filed a motion for leave to file a complaint in intervention, seeking essentially the same declaratory and injunctive relief on behalf of its members, many of whom rely on subsistence hunting and fishing to feed their families. The Honorable Charles B. Renfrew granted this motion on March 19, 1974. Judge Renfrew also entered partial summary judgment in favor of Russ, Whipple, and the Covelo Community on March 22, 1976,[15] holding that Congress did not intend to remove the situs of the kill and the other approximately 100 square miles opened to non-Indian settlement by the 1890 Act from the Round Valley Indian Reservation. In an unreported order granting further partial summary judgment on June 28, 1976 in favor of petitioners, Judge Renfrew declared that the California Department of Fish and Game could not apply the Fish and Game Code to limit on-

[15]Reported at 410 F. Supp. 579.

reservation subsistence hunting and fishing by members of the Community, and awarded nominal damages of $10 for the loss of the deer.

On appeal, the Court of Appeals reversed on August 1, 1980, holding, over a vigorous dissent, that Congress did intend the 1890 Act to terminate the reservation status of the situs of the kill. For the reasons noted below, in the opinion of Judge Renfrew in the District Court, and in the opinion of Judge Hoffman in dissent in the Court of Appeals, the Petitioners now seek review in this Court to establish that (1) Congress did not intend the 1890 Act to terminate the reservation status of approximately 100 square miles of the Round Valley Indian Reservation in order to accommodate the exactly two settlers who bought only 1223.43 acres, and (2) the members of the Covelo Community may hunt and fish within the original 1873 boundary of their reservation for subsistence purposes without regard for the provisions of the California Fish & Game Code.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I.

Even though this Court has developed a body of substantive law regarding whether Congress intended certain statutes to alter the boundaries of Indian reservations, the present case presents important and novel questions in this regard not yet answered by this Court.

In recent years, this Court's opinions in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Mattz v. Arnett*, 412 U.S. 481 (1973) and *Seymour v. Superintendent*, 368 U.S. 351 (1962) have provided a general framework of analysis for the use of all federal courts in determining whether Congress intended certain federal statutes of the 1890-1913 period to alter the exterior boundaries of Indian reservations. In each case, Congress struck a balance bet-

ween the competing desires of the Indians to retain as much of their reservation land as possible and the desires of local non-Indians to be allowed "surplus" land on the reservations. In some cases, such as *Rosebud* and *DeCoteau*, the balance that was struck evinced a clear Congressional purpose to constrict the reservation boundary to exclude the lands thus opened to non-Indian settlement from the reservation. In other cases, such as *Mattz* and *Seymour*, Congress struck a balance which "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards", *Mattz*, *supra*, at 497, quoting *Seymour*, *supra*, at 356, *without* any constriction of the reservations's exterior boundary.

In each such case, Congress was called upon to strike such a balance due to pressure from non-Indians who wished to acquire "surplus" reservation land. In *Rosebud*, this Court characterized those desiring such Indian lands as "'familiar forces' . . . pressing for the opening of Indian lands." *Id.*, at 606. In *DeCoteau*, these "familiar forces" were a "nearby and growing population of white farmers, merchants, and railroad men . . . urging authorities in Washington to open the reservation to general settlement." *Id.*, at 431. In *Mattz*, local non-Indians "wished to exploit the lumber and soil of the area." *Id.*, at 500. In *Seymour*, the statute in question "prescribed the method for disposal of surplus lands under the homestead laws...", *Id.*, at 355. In cases where such settlers rendered the opened lands "over 90% non-Indian, both in population and in land use", the balance which Congress struck in favor of these "familiar forces" operated to "create . . . justifiable expectations which should not be upset . . .". *Rosebud*, *supra*, at 605.

But on the Round Valley Reservation, the situation was precisely to the contrary. There were no "familiar forces" of neighboring non-Indians clamoring for a legitimate way to make an initial acquisition of reservation lands. Instead, on the Round Valley Reservation, there were the *unfamiliar* forces of precisely 9 families and firms[16] who had seized 97,000 of the 102,000 acres of the reservation, despite the best efforts of the United States to dislodge them, as noted in detail in the Statement of the Case. Surely their presence as squatters, whose removal was a primary purpose of the 1873 Act, created no "justifiable expectations" that they could continue their trespass with impunity.

Furthermore, once the actual payment for their improvements and the statutory authorization for the use of military force to effect their removal from the reservation finally succeeded in dislodging these 9 trespassers from their holdings, exactly two legitimate settlers were interested in the 63,642.57 acres of the Round Valley Indian Reservation made available to legitimate non-Indian settlement by the 1890 Act, and even those two bought only 1,223.43 acres at the sale conducted on April 19, 1894.[17] The interest shown by these two legitimate settlers in the lands made available on the Round Valley Indian Reservation by the 1890 Act is negligible when compared with the 114,769 legitimate settlers who entered a lottery for the approximately 4000 homesteads made available by the 1907 statute considered in *Rosebud.*[18] As the Court of Appeals noted, "The purpose of the 1890 Act was to solve a problem for the Indians, not to provide surplus reservation land for settlement by non-Indians." *Russ, supra,* at 920.

[16]Listed by name in Senate Report No. 1522, *supra, p. 2*

[17]Senate Report No. 2618, 58th Cong., 2nd Sess., April 26, 1904, p.2.

[18]Charles Lowell Green, *The Administration of the Public Domain in South Dakota,* South Dakota Historical Collections, vol. 20, pp. 168-70 (1940).

Taken together, this Court's opinions in *Rosebud*, *DeCoteau*, *Mattz*, and *Seymour* provide a ready framework for analysis of the kind of situation which each of them considered: whether Congress, in accommodating the competing interests of Indians who wished to retain their reservation land and throngs of legitimate settlers who wished access to the same land, intended to constrict the reservation's exterior boundary so as to exclude the opened land. However, this Court has never considered this issue in the context of the opening of part of an Indian reservation when (1) there was negligible non-Indian interest in the opened lands, either before or after the opening and Congress' intent clearly was not to accommodate non-Indians in any way; (2) there were no "justifiable expectations" of non-Indians to defeat by a holding that the opened lands were included within the reservation; and (3) the clear purpose of Congress in enacting the statute in question, as discussed above in the Statement of the Case and as noted by the Court of Appeals, *supra*, was to afford the maximum possible protection to Indian land interests and to restore the integrity of a reservation, 95% of which had been seized by trespassers. These stark factual differences set the situation at Round Valley distinctly apart from the situations which this Court considered in *Rosebud*, *DeCoteau*, *Mattz*, and *Seymour*.

Even though the Court's analysis in each of these four prior cases has been consistent, the Court has analyzed each separately in light of each reservation's peculiar history. "[Mattz] first examined the history of the Reservation [cit. om.] and then examined the enactment in light of this history and other surrounding circumstances." *Rosebud*, *supra*, at 588, n.4. To this extent, each such case is *sui generis* and should be examined individually by this Court, as in *Rosebud*, *DeCoteau*, *Mattz*, *and Seymour*. The need for such individual consideration is even greater in the case of Round Valley because of the glaring factual and historical differences noted above, raising the issue, as yet

unanswered by this Court, of the extent to which this Court's prior framework for analysis applies to an opening of an Indian reservation the history and circumstances of which differ so significantly from those considered in this Court's prior opinions.

II

The Court of Appeals misapprehended or misapplied this Court's teachings in Rosebud and DeCoteau.

Petitioners submit that the majority of the Court of Appeals has significantly deviated from this Court's teachings in *Rosebud* and *DeCoteau*, in the following respects.

First, the Court of Appeals gave considerable weight to the post-1890 jurisdictional history of the opened lands. It concludes without citation or example that "the federal government has not exercised jurisdiction over the land relinquished by the 1890 Act, and the State of California has exercised jurisdiction over this area." *Russ, supra*, at 924. The kind of exercise of state jurisdiction which creates the "justifiable expectations" to which this Court referred in *Rosebud, supra*, at 605, is the kind of large-scale non-Indian population and state presence of which the Court spoke in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, n. 1 (1978):

> Residing on the reservation is an estimated population of approximately 2,928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest.

In the case of Round Valley, however, the opened lands in question are virtually uninhabited due to their rugged and mountainous nature, which was a primary reason for the resounding lack of non-Indian interest in the opened lands when they were offered for sale under the 1890 Act in

1894. As Senator Dawes stated in his 1885 report, "Hardly any of the upland can be used for homestead purposes."[19] And the Congressman for the area stated that the lands opened by the 1890 Act were "rugged and mountainous and hardly habitable for human beings."[20]

The record discloses that the state's exercise of jurisdiction over the opened Round Valley lands has not been as noted above in *Oliphant*, but rather has been limited to an occasional foray by a single game warden, whose acts should be of no consequence in any event since he testified that he arrested Indians for violations of the Fish & Game Code not only on the opened lands but also on portions of the reservation *not* opened by the 1890 Act. The state's token exercise of jurisdiction at Round Valley simply does not amount to the kind of large-scale state and non-Indian activity which this Court found to be of significance in *Rosebud* and *DeCoteau*.

Second, because the majority of the Court of Appeals apparently found no ambiguous or doubtful language in the 1890 Act, it did not consider or employ the "eminently sound and vital canon of construction"[21] that statutes enacted for the benefit of Indians should be construed in their favor to the extent that they exhibit ambiguous or doubtful language. However, the majority relied in part on the presence of the phrase "reduction of the Round Valley Indian Reservation" in the title, but not the text, of the 1890 Act in finding a clear Congressional purpose to constrict the exterior boundary of the reservation. It did so even though it cited this Court's opinion in *Cornell v. Coyne*, 192 U.S. 418 (1904) for the proposition that a statute's "title may be helpful in interpreting *ambiguities* within the context of the Act." *Russ, supra*, at 922, em-

[19]Senate Report No. 1522, *supra*, p. 7.

[20]39 Cong. Rec. 399, Dec. 19, 1904.

[21]*Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655, n. 7 (1976).

phasis added. If the text of the 1890 Act exhibited so much ambiguity as to justify resort to its title to interpret that ambiguity, then surely that same text must have exhibited enough ambiguity to require some consideration of the general rule of interpreting such ambiguities in favor of the Indians. Judge Hoffman, in dissent, began his analysis with this proposition (*Id.*, at 926) and concluded that "too much ambiguity exists as to what Congress intended at the time of the passage of the Act of 1890" (*Id.*, at 927) to ignore the general rule. Instead, he, like Judge Renfrew of the District Court, finds no such clarity of purpose, but rather sufficient ambiguity to trigger the general rule.

Had the majority simply differed with the dissent and the District Court on the degree of ambiguity present in the 1890 Act, then such a difference might not justify this Court's intervention to correct the error. But the majority does find enough ambiguity in the text to justify recourse to the title. If this is so, then *all* members of the appellate panel and the District Court *have* found significant ambiguity in the text of the 1890 Act, and yet the majority does not consider or employ this Court's teachings that, with respect to statutes purportedly affecting reservation boundaries, this Court "give[s] this rule the broadest possible scope . . . [although it] is not a license to disregard clear expressions of tribal and congressional intent." *DeCoteau, supra*, at 447. In the sense noted above, *all* members of the appellate panel plus the District Court found ambiguity, and yet the majority did not employ the rule at all, much less give it its "broadest possible scope." To this extent, the majority has deviated seriously from *DeCoteau* and *Rosebud* and the deviation should be corrected by this Court, lest the rule be drained of all vitality in such cases where significant ambiguity *is* expressly found to be present.

Third, this Court in *Rosebud* found an "unmistakable baseline purpose of disestablishment" (*Id.*, at 592). In *DeCoteau*, this Court noted factors which "all point unmistakably" to a Congressional purpose to terminate the reservation status of the opened lands. The constriction of the reservation's boundary in both cases was a Congressional accommodation of the interests of the non-Indian settlers who wished to avoid being subject to the kinds of tribal civil jurisdiction over them, such as taxation[22], which this Court has held still exist as an aspect of retained tribal sovereignty, as to which this "Court has repeatedly emphasized . . . there is a significant geographical component." *White Mountain Apache Tribe v. Bracker*, _____U.S. _____, _____; 65 L.Ed. 2d 665, 667 (No. 78-1177, June 27, 1980). *See also U.S. v. Mazurie*, 419 U.S. 544, 558 (1975) and *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978).

In the present case, however, the Court of Appeals imputed a similar purpose to Congress, but did so in the absence of any need to protect the interests of the exactly two non-Indians who initially settled on the lands opened by the 1890 Act. The majority of the Court of Appeals noted this circumstance:

> The purpose of the 1890 Act was to solve a problem for the Indians, not to provide surplus reservation land for settlement by non-Indians. The sale of land to non-Indians in Round Valley was incidental to Congress's primary intent of setting aside and preserving a new, smaller reservation for the Round Valley Indians.

Russ, supra, at 920. The dissent (*Russ, supra*, at 932) also noted it and concluded that there were no significant non-Indian interests for Congress so to protect under the 1890 Act:

[22] *Washington v. Confederated Tribes of the Coville Reservation*, _____U.S. _____, _____; 65 L.Ed.2d 10, 29 (No. 78-649, June 10, 1980); *Morris v. Hitchcock*, 194 U.S. 384, 393 (1904).

> The very nature of the 60% of the Reservation which was opened for settlers by the Act of 1890 suggests that only hunting and fishing could be a "justifiable expectation" of use by Indians and non-Indians alike. The Congressman for that area described the opened lands as "rugged and mountainous and hardly habitable for human beings".

In this sense, the clear Congressional purpose to constrict reservation boundaries to exclude the opened lands, which this Court found in *Rosebud* and *DeCoteau*, was distinctly absent in the 1890 Act. Yet the majority of the Court of Appeals found such a clear purpose. It did so largely on the strength of the reference to "reduction" in the title of the 1890 Act (*Russ, supra*, at 927); the District Court interpreted an equivalent reference to a "diminished" reservation in a similar statute opening part of another reservation to non-Indian settlement as connoting no change in exterior boundary. *Russ v. Wilkins*, 410 F. Supp. 579, 582-3 (N.D. Cal., 1976), citing *U.S. v. Erickson*, 478 F.2d 684, 687 (8th Cir., 1973).

Because this Court cited *Erickson* with apparent approval in *Mattz* (412 U.S. at 497, n.19), the petitioners submit that the majority in *Russ* misread this Court's holdings in *Mattz, DeCoteau* and *Rosebud* in finding a similar clear purpose of boundary constriction in *Russ*, in which, unlike the other cases, there were no "justifiable expectations" of non-Indians to protect. Petitioners agree with the majority, that "The purpose of the 1890 Act was to solve a problem for the Indians, not to provide surplus reservation land for settlement by non-Indians." *Russ, supra*, at 920. But in these unusual factual circumstances, it was a misreading of this Court's prior holdings for the majority also to conclude (*Id.*) that

> To have allowed the reservation to remain at its 1873 boundaries would not have accomplished the separation and consolidation needed to solve the problems at Round Valley.

On the contrary, this Court has held that the rule requiring the resolutqon of doubtful or ambiguous statutory language in favor of the Indians should be given "the

broadest possible scope" (*DeCoteau, supra*, at 447) in cases such as this, particularly because the Court presumes that Congress deals in good faith with the rights of Indians to their reservation lands and does not gratuitously terminate such rights for no purpose and without specific language, as the majority would permit. See *Missouri, Kansas & Texas Railway Co, v. Roberts*, 152 U.S. 114, 117-8 (1894) and *Leavenworth, L. & G. Railroad Co. v. U.S.*, 92 U.S. 733 (1876). To honor this presumption and to follow this Court's teachings in *Mattz, DeCoteau* and *Rosebud*, the District Court's opinion should be followed on the question of whether Congress' intent "to solve a problem for the Indians, not to provide surplus reservation land for settlement by non-Indians" (*Russ, supra* at 920) necessarily required a constriction of the reservation's boundary:

> However, the rather specific segregation of Indian from non-Indian patent areas is well founded in the Reservation's history. The Reservation has had a tragic history whereby proximity to settlers has resulted in a disappropriation of land from the Indians. Furthermore, the open-range system in Round Valley has resulted in a significant number of cattle belonging to the Indians, being intermingled with the herds of cattle of the settlers, being lost or stolen. The unusual allotment boundary here is not sufficient evidence of a termination of the northern portion of the Reservation.

In this respect, the dissent concurs that the rearrangement of zones of occupancy accomplished by the 1890 Act did not connote any change in boundary:

> Congress responded, in an attempt to ameliorate the existing conditions which included bloodshed and inter-racial violence, by designating specific and discrete zones of Indian and non-Indian occupancy on the reservation as created in 1873.

Russ, supra, at 929.

III

THE INCREASED DIFFICULTY OF LAW ENFORCEMENT ON THE LAND OPENED BY THE 1890 ACT JUSTIFIES ISSUANCE OF THE WRIT.

In its prior opinions, this Court has eschewed holdings which would create "checkerboard jurisdiction" by which "law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense . . . is in the State or Federal Government." *Seymour, supra*, at 358, discussed in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478 (1976). If this Court permits the majority opinion to stand, the already difficult problems of law enforcement will be exacerbated over an area of approximately 100 rugged square miles, as noted below.

"Because of lack of interest"[23] by non-Indians in the opened lands, sales of those lands languished for over 50 years, permitting the Secretary of the Interior in 1947 to "restore . . . approximately 7,531 acres of vacant land within the relinquished parts of the reservation to tribal ownership" (*Russ, supra*, at 916). These restored lands are scattered throughout the opened area (see reference map) and are the primary hunting and fishing grounds of the Indians of Round Valley. This is particularly so regarding those restored parcels located along the shore of the Eel River, which forms the northern, western, and eastern boundaries of the reservation under the 1873 Act and from which the Indians routinely exercise "the privilege of fishing in said streams" which was expressly granted to them by Congress in Section 2 of the 1873 Act.

Even if the 1890 Act removed the lands between these scattered restored parcels from the reservation, the Indians' hunting and fishing rights under the 1873 Act con-

[23] *Russ, supra*, at 929, Hoffman, J., dissenting.

tinue to survive, certainly on those restored parcels and perhaps on the intervening opened lands. *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968). Because the game warden testified that he arrested Indians for violating state law, whether on restored parcels or not, in this area, it is likely that such arrests will continue if the Court permits the majority opinion to stand. In that case, even if the game warden limits his arrests to the parcels located between the restored parcels in the opened area, the practical problems of law enforcement will be at their most confusing and jurisdictional worst, as game wardens must literally carry tract books and locate section corners before each arrest, while the suspect either flees or jettisons the evidence. The general situation described by this Court in *Seymour* and *Moe*, *supra*, is difficult enough when tribal members admittedly may ignore state hunting and fishing law on the restored parcels, but the special situation at Round Valley is significantly more difficult when tribal members may also be apprehended for illegal possession or similar offenses while carrying their catches across the unrestored intervening opened parcels toward home. Review by this Court would determine if Congress really intended such a deleterious and unworkable result, particularly at the expense of Indians whom Congress intended the 1890 Act to benefit, not harm.

CONCLUSION

For the reasons noted above, the petitioners urge the Court to grant their petition for a writ of certiorari.

Respectfully submitted,

Art Bunce, *Counsel of Record*
KARSHMER & BUNCE
333 S. Juniper St., Suite 105
Escondido, California 92025
Telephone: 714-489-0329

Bruce J. Friedman
George Forman
David Rapport
Lester J. Marston
CALIFORNIA INDIAN LEGAL SERVICES
P.O. Box 488
Ukiah, California 95482
Telephone: 707-462-3825

James F. King, Jr., Of Counsel
P.O. Box 428
Willits, California 95490

Counsel for Petitioners

February, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH A. RUSS, JAMES WHIPPLE, and THE COVELO INDIAN COMMUNITY OF THE ROUND VALLEY INDIAN RESERVATION,

Plaintiffs, Plaintiff in Intervention and Appellees,

v.

RICHARD E. WILKINS, et al.,

Defendants and Appellants.

No. 76-2776

D.C. No. C-73-2279-CBR

OPINION

Appeal from the United States District Court
for the Northern District of California
The Honorable Charles B. Renfrew, Presiding
Date of submission: September 11, 1978

Before: BROWNING and HUG, Circuit Judges,
and HOFFMAN*, Senior District Judge.

HUG, Circuit Judge:

This action concerns the boundaries of the Round Valley Indian Reservation in Mendocino County, California, where the members of the Covello Indian Community reside. The appellants contend that the Round Valley Indian Reservation, as established by a Congressional Act of 1873, was reduced in size by a Congressional Act of 1890. The appellees maintain that the Act of 1890 merely authorized the sale to non-Indians of a portion of the reservation land outside certain boundaries, without altering the boundaries of the reservation.

Appellees Russ and Whipple, enrolled members of the Covello Indian Community, killed a deer on land that was within the reservation as established in 1873, but was outside the boundaries established pursuant to the Act of 1890. The appellees were apprehended and the deer was confiscated by appellant Wilkins, a warden of the California Department of Fish and Game. The issue presented by this appeal is whether the site upon which the deer was killed is within the Round Valley Indian Reservation and thus is "Indian country," where the California fish and game laws do not apply to the Indians, at least as to noncommercial hunting and fishing.

Appellees Russ and Whipple brought this action against Wilkins and the California Director of the Department of Fish and Game, seeking damages for the value of the confiscated deer. Russ and Whipple, together with the plaintiff in intervention, the Covello Indian Community, also seek declaratory and injunctive relief concerning the boundaries of the reservation and the jurisdiction to regulate hunting and fishing thereon.

*The Honorable Walter E. Hoffman, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The court entered summary judgment, awarding to Russ and Whipple nominal damages in the amount of $10.00 as compensation for the confiscation of the deer and declared that the boundaries of the reservation are those established by the Act of 1873; that the reservation had not been diminished by the Act of 1890; and that the members of the Indian Community were immune from the California fish and game laws while hunting or fishing for subsistence on land within the boundaries of the reservation as established in 1873.[1] We reverse.

I
BACKGROUND

Round Valley, located in what is now Mendocino County, California, was originally set aside for Indian use in 1858 by an order of the Secretary of the Department of the Interior. The area was composed of a small, fertile valley completely ringed by coastal range mountains. On March 30, 1870, pursuant to the Four Reservations Act of 1846, 13 Stat. 39, President Grant established the Round Valley Indian Reservation by Executive Order and expanded the tract to a total size of over 31,000 acres. However, non-Indians ignored the reservation status of the land and settled upon the land within the reservation boundaries, claiming title from the State of California under the Swamp Act of 1850, 9 Stat. 519.

On March 3, 1873, Congress made a major change in the reservation, 17 Stat. 633. The southern two-thirds of the agricultural land in Round Valley, approximately 12,000 acres, was restored to the public domain, to be sold to non-Indians; and 89,000 acres of mostly mountainous land was added to the northern portion of the reservation, making the 1873 reservation approximately 102,118 acres in size.

[1]The court stated that it made no determination whether the immunity extended to non-subsistence hunting and fishing.

All non-Indians living within the new reservation boundaries were to be required to leave upon being reimbursed for their improvements out of the proceeds from the sale of former reservation land. Indians living outside the reservation were to be relocated to the new reservation. The eastern, western and southern boundaries of the reservation were specifically outlined in the Act. The northern boundary was fixed at a later date by a commission established by the 1873 Act.

Despite this congressional compromise, non-Indian settlement on reservation land continued. The movement of non-Indians from the reservation, as provided for in the 1873 Act, was never effected because sale of land within the southern portion of the valley was not sufficient to pay for the interests of non-Indians living in the new reservation, and Congress did not appropriate sufficient money to make the payments. Neither court orders nor military action could dislodge the settlers.

In 1884 a Senate committee was established to inquire into the conditions of certain Indians in California, particularly those at the Round Valley Reservation. This committee, chaired by Senator Dawes, noted in its report (Dawes Report)[2] submitted on February 27, 1885, that 97,000 acres of the reservation were occupied by non-Indians, leaving the 500-600 Indians confined to about 5,000 acres in the valley floor. Most of the non-Indian claims were without legal basis. The Indians were afraid to travel on Indian land and much of their livestock was lost or stolen. Deprived of the use of their land, these Indians became dependent upon the federal government, which supported them at considerable expense.

In response to the problems between Indians and non-Indians in Round Valley, on October 1,1890 Congress again dealt with the reservation in "An act to provide for the reduction of the Round Valley Indian Reservation. . ." 26

[2]S. Rep. No. 1522, 48th Cong., 2d Sess. 1 (1885).

Stat. 658. This legislation is the focus of the present appeal. The Act provided that a portion of the reservation was to be surveyed and allotted in separate tracts to individual Indians, and an additional portion of grazing and timber lands was to be set aside to be used in common by the Indians. Non-Indian claims on the land within this area selected for Indian use were to be appraised and compensated for, with payment to be made by the Secretary of the Interior, and the non-Indians were then to be removed from these lands retained for Indian use. The rest of the land was to be sold in 640-acre plots, with the proceeds from these sales to be placed in the Treasury of the United States to the credit of the Indians. The 1890 Act provided that the specific boundaries of the land reserved for the Indians would be determined by a commission composed of three disinterested persons. The commission, in carrying out this function, allotted to the Indians the southwest portion of the reservation, consisting of approximately 43,680 acres of both valley and mountain lands, to be used for farming and grazing. The surplus was offered at public sale.

The sale of land from the relinquished portions of the 1873 reservation was unsuccessful; only about 1,200 acres out of the 63,680 opened for non-Indian settlement were sold. On February 8, 1905, the unsold portions of the 63,680 acres were opened to homestead entry and settlement; the land remaining unclaimed after five years was to be sold. See 33 Stat. 706.

On February 11, 1947 the Secretary of the Interior issued an order of restoration, pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984. This order returned approximately 7,531 acres of vacant land within the relinquished parts of the reservation to tribal ownership.

II

THE EFFECT OF THE ACT OF 1890 ON THE BOUNDARIES OF THE ROUND VALLEY INDIAN RESERVATION

We must determine the exact boundaries of the Round Valley Indian Reservation; specifically we must determine whether the Congressional Act of 1890 reduced the size of the reservation as established by Congress in 1873. The district court, relying primarily on *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), and *DeCoteau v. District County Court*, 420 U.S. 425 (1975), held that the Act of 1890 did not change the boundaries of the reservation, as established by the Act of 1873. *Russ v. Wilkins*, 410 F. Supp. 579 (N.D. Cal. 1976).

Between the time that the district court rendered its decision and this appeal was taken, the United States Supreme Court, in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), again considered the tests to be employed in determining whether a Congressional Act changes or continues the boundaries of a reservation. Thus, we are assisted in our present inquiry by an additional delineation of the proper analysis to be employed in cases of this nature, which was not available to the district court.

In deciding whether the 1890 Act permanently reduced the size of the Round Valley Indian Reservation, we are guided by the pronouncements in *Rosebud*. The court stated:

> The underlying premise is that congressional intent will control. *DeCoteau v. District County Court, supra*, at 444, 449; *United States v. Celestine*, 215 U.S. 278, 285 (1909). In determining this intent, we are cautioned to follow "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *quoting Carpenter v.*

Shaw, 280 U.S. 363, 367 (1930); *see also Mattz v. Arnett*, *supra*, at 505. The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status. *Mattz v. Arnett*, *supra*; *see also Seymour v. Superintendent*, 368, U.S. 351 (1962). But the "general rule" does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. *DeCoteau v. District County Court*, *supra*. In all cases, "the face of the Act," the "surrounding circumstances," and the "legislative history," are to be examined with an eye toward determing what congressional intent was. *Mattz v. Arnett*, *supra*, at 505.

430 U.S. at 586-87. Thus, our inquiry, as mandated by *Rosebud*, 430 U.S. at 588 n.4, consists of an examination of *all* the factors which reveal congressional intent.

In the present case, the meaning of the language of the 1890 Act is best analyzed by reference to the circumstances that existed at the Round Valley Indian Reservation prior to enactment of the 1890 Act and by reference to the legislative history of that Act. *See Rosebud*, 430 U.S. at 588, n.4. Using this analysis, we conclude that the Act of 1890 evidences a strong congressional intent to change the boundaries of the Round Valley Indian Reservation so as to reduce its size.

A. Surrounding Circumstances and Legislative History Leading to the Enactment of the 1890 Act.

Congressional intent to disestablish a portion of the Round Valley Indian Reservation in 1890 is clear from a review of the circumstances surrounding the Round Valley Indians and the legislative history of the 1890 Act. The history of the reservation is one of constant friction between Indians and non-Indians and encroachment by non-Indians upon reservation land, an intrusion which the government was unable to curtail. This encroachment deprived the Indians of the use of their land and of the means by which they could provide for themselves. Consequently they became dependent upon the federal government for subsistence. The Act of 1890 was an attempt to remedy this situation by reducing the reservation to a

manageable size, removing the non-Indians from the lands retained for the Indians, securing the reduced reservation for the exclusive use of the Indians, and opening the remaining portion of the former reservation lands for sale to non-Indians who were then able to obtain legitimate title to the land.

The 1885 Dawes Report concerning the Round Valley Indian Reservation clearly outlined the need for the 1890 legislation. The Dawes Committee "found the greater part of the reservation in the possession of several white men,"[3] who grazed livestock on the upland portion of the reservation. The 500-600 Indians were confined to approximately 3,000 acres of valley land and 1,000-2,000 acres of grazing land. The occupancy by non-Indians was without compensation for the use of the land, and, in most cases, was without valid title to the land. The Committee stated that these non-Indians were making large profits from the use of reservation land and concluded that non-Indian occupancy of reservation lands was valued at $30,000 a year, which was a direct loss to the Indians and the federal government. The Committee reported that the full reservation embraced "land productive and well calculated for the production of everything necessary for the support of many more Indians than are now to be found in the State of California."[4] However, the Committee found that the Round Valley Indians were so confined in the use of their land that they could not maintain sufficient herds of livestock to sell for a profit, or even to provide for their own subsistence. Thus, the federal government had been obligated to pay for the support of the Indians upon the reservation since 1873. In some cases, the Indian Agency had purchased cattle for the Indians' consumption from the same non-Indians who were illegally using the Indians' lands. The Dawes Report stated that this outlay of government money for support of the Indians was alone "a suffi-

[3] *Id.* at 2.

[4] *Id.* at 3.

cient commentary upon the folly which has marked the administration of the reservation during this time."[5]

The Dawes Committee reported that attempts to expel the non-Indians had been feeble and unsuccessful. The 1873 Act concerning Round Valley would have required non-Indian settlers to leave the reservation upon receipt of payment for improvements which they had made upon Indian lands. However, sufficient funds to pay the settlers were not generated from the sale of former reservation lands; nor did Congress appropriate sufficient funds to make the payments. Thus, the non-Indian settlers refused to leave. The Committee reported that a lawsuit concerning title to 1,080 acres within the reservation had been decided against the federal government.

The Dawes Report recommended that:

> [T]he earliest measures should be taken to reduce the boundaries of this reservation to the present wants of these Indians . . . A few thousand acres of valley land, with perhaps a small portion of upland for grazing purposes, is all that can be utilized for their benefit. To these needs the limits of the reservation should be reduced, and all Indians capable of taking care of themselves should be put upon a sufficient amount of this valley land, each in severalty, and in quantity sufficient for his support . . . [It] is the duty of the Government to take these Indians and their reservation in hand, and, after having reduced the reservation to their present wants and prospective development and apportioned to each one all his necessities, require the balance of the reservation to be sold and the money put into the Treasury for the benefit of these or other Indians. . . . These Indians are now so far advanced that a little care and the proper disposition of them upon a portion of this land will result in making them not only self-supporting, but . . . useful members of the community.[6]

The Committee recommended that measures should be taken at once to complete the appraisals and payments to non-Indians for their improvements, as required by the 1873 Act, and stated that, if necessary, the Army should be used to remove those non-Indians. It is clear that the

[5] *Id.*

[6] *Id.* at 7-8.

Dawes Report, in suggesting a solution for the problems existing at Round Valley Indian Reservation in 1885, recommended reducing the size of the reservation. It proposed the establishment of a smaller reservation, which would more closely correspond to the needs of the Indians, could be properly managed by the federal government, and could be secured for the Indians against encroachment by non-Indians.

The findings and recommendations of the 1885 Dawes Report were largely the basis for the legislation regarding the Round Valley Indian Reservation that was considered by Congress during the period from 1886 to 1890. In January, 1886, President Cleveland sent a message to Congress containing a proposed bill, "To provide for allotments of lands in severalty to the Indians residing upon the Round Valley Reservation, in the State of California, and granting patents thereof and for other purposes."[7] The message was accompanied by a report from the Secretary of the Department of Interior and the Commissioner of Indian Affairs. The Commissioner's report referred to the findings contained in the Dawes Report and quoted verbatim the Committee's recommendations including the statement that "measures should be taken to reduce the boundaries of this reservation to the present wants of these Indians." The Commissioner concurred in the Committee's recommendations and urged passage of the bill. Also included in the 1886 message to Congress was a petition from 145 Round Valley Reservation Indians requesting that the government regain title to the 'swamp lands" within the reservation which a federal court had decided were lawfully held by non-Indians under disputed grants from California, and give allotments of the land to the Indians. The Indians' petition outlined the problems caused by the non-Indian settlers. The specific provisions of the 1886 bill were similar to those of the law finally

[7]H.R. Exec. Doc. No. 21, 49th Cong., 1st Sess. 1 (1886).

enacted in 1890. The 1886 legislation was approved by the Senate, but failed to pass in the House.

In 1888 President Cleveland sent a strongly-worded message to Congress along with a bill "to provide for the reduction of Round Valley Indian Reservation, in the State of California, and for other purposes."[8] Attached to the President's message was a lengthy report from the Secretary of the Interior which included a detailed summary of the situation at Round Valley from the Commissioner of Indian Affairs and numerous pieces of correspondence from various agencies, including the United States Army, the United States Attorney's Office, the Department of War and the Department of the Interior, which agencies had dealt with the situation at Round Valley. The Commissioner's report reviewed the history of the reservation and the non-Indian encroachment upon Indian land, as had the Dawes Report, and added further information underscoring the need for congressional action. The Commissioner's report noted that repeated efforts had been made, using both the military and the courts, to dislodge the settlers, but to no avail. The report stated that a federal circuit court in 1880 decided that three of the settlers had valid title to "swamp lands" under a grant from the State of California and that the settlers were not required by the 1873 Act to vacate the reservation lands until they were paid for their improvements. The report further stated that in 1887 the Army was deployed to evict all non-Indian settlers from the reservation, but the Army was stopped by an injunction issued by a state court. The Commissioner's report quoted a letter from General Howard to the War Department regarding the situation at Round Valley which stated:

> Most of the intruders have grown rich, arrogant and insolent in their high-handed encroachments upon the land set apart for the exclusive use and benefit of the Indians. Congressional legislation looking towards a settlement has been defeated in committee.

[8]H.R. Exec. Doc. No. 33, 50th Cong., 1st Sess. 1 (1888).

> The agency cattle are driven off and the agency herder forbidden to "work" his cattle on their ranges.
>
> * * *
>
> I recommend new legislation, and that in it some other method be taken to compensate claimants and intruders than by continuing them and their herds within the boundaries of the reservation.[9]

The Commissioner also quoted the 1885 Dawes Report's recommendation. The Commissioner's report concluded that:

> (w)ithout further legislation nothing will be accomplished and the present 'extraordinary and disgraceful state of affairs' will be continued for another generation.[10]

However, the 1888 bill also failed to pass in the House.

A draft of the bill which was finally approved by the legislators was sent to Congress in 1889 by President Harrison. The President referred to the draft as a bill "to provide for the reduction of the Round Valley Indian Reservation in the State of California, and for other purposes."[11] It was accompanied by a report from the Secretary of the Interior that referred to the Commissioner's report, which had been sent to Congress with the bill proposed in 1888. That Commissioner's report had set out the history of intrusions upon the Round Valley Indian Reservation and cited the recommendations of the Dawes Report. This bill was passed by both Houses of Congress without amendment and without much debate. The bill was reported out of both the House and Senate Committees on Indian Affairs without comment. The only congressional debate on the bill was held in the House during which the representatives briefly discussed the bill's provisions for land allocation and method of payment. There was no discussion as to boundaries or jurisdiction.

[9] *Id.* at 13-14.

[10] *Id.* at 15.

[11] H.R. Exec. Doc. No. 72, 51st Cong., 1st Sess. 1 (1889).

These circumstances surrounding the enactment of the 1890 Act and its legislative history indicate that Congress, in passing the 1890 legislation, was seeking to solve a very specific problem that existed at the Round Valley Indian Reservation. Following the recommendation of the Dawes Committee, the congressional solution was to reduce the Round Valley Indian Reservation to a smaller size, which would correspond more appropriately to the needs of the Indians and would be easier for the federal government to manage and preserve for Indian use. The 1890 Act was designed primarily to set aside a reserve exclusively for Indians which would not be encroached upon by non-Indians. The Act accomplished this goal by authorizing a commission to reduce the size of the reservation, allot reservation land to the Indians, remove non-Indians from the reserve established for the Indians, and offer the remaining land for sale. The purpose of the 1890 Act was to solve a problem for the Indians, not to provide surplus reservation land for settlement by non-Indians. The sale of land to non-Indians in Round Valley was incidental to Congress's primary intent of setting aside and preserving a new, smaller reservation for the Round Valley Indians. To have allowed the reservation to remain at its 1873 boundaries would not have accomplished the separation and consolidation needed to solve the problems at Round Valley.

B. The Face of the Act.

The district court determined that the language used in the Act of 1890 and was not synonymous with discontinuation, abolishment or cession, and thus did not terminate reservation status of the disputed lands. *Russ v. Wilkins*, 410 F. Supp. at 582. However, when read in light of the legislative history of the Act and the surrounding circumstances, the wording of the 1890 Act clearly shows that the intent of Congress was to establish a smaller manageable reservation and to discontinue the reservation status of lands opened for sale to non-Indians.

The provisions of the 1890 Act may be summarized as follows:

1. The Act directed that the agricultural lands be surveyed into ten-acre tracts to be allotted to the Indians severally. The President was given the discretion to allot these parcels in such quantities and to such classes of Indians belonging on the Round Valley Indian Reservation as he deemed expedient and for the best interest of the Indians. Sufficient agricultural land was to be reserved for agency, school and mission purposes.

2. The Act further directed that a reasonable amount of grazing and timber lands be reserved for the use of the Indians in common. The President was also given discretion to allot these lands in individual parcels in severalty as he deemed expedient for the best interest of the Indians. These grazing and timber lands were to be selected by a Commission of three disinterested persons appointed by the President.

3. The Act specified that the Commission was to appraise and the Secretary of Interior was to pay for certain lands and improvements "within the reservation, as hereby established." The payments were to be based upon the following:

a. The value of all agricultural land which had been acquired by individuals as a result of a purchase from the State of California together with the value of the improvements on those lands. (This took care of the non-Indians who had purchased land from the State of California under the Swamp Act.)

b. The value of improvements only on the agricultural land or common land which had been reserved for the Indians under the terms of this Act. (This took care of reimbursing non-Indians for the value of the improvements they had placed on land to which they did not have title.)

4. The Act provided that the remainder of the grazing and timber lands "in the reservation as at present existing" be surveyed into tracts of 640 acres each and the "boundary lines of the *reserved* lands shall be run and

properly marked." (Emphasis added). The 640-acre parcels were to be appraised together with any improvements on them. The parcels were then to be sold at not less than the appraised price, and not less than one dollar and a quarter per acre. A person having appraised improvements on a parcel had a preference right to purchase at the appraised price.

5. The net proceeds derived from the sale of the lands, after payment of expenses of the survey, appraisement and sale, and reimbursement for the payments made to non-Indians for the lands and improvements, were to be placed in a fund in the United States Treasury to be used for the Indians.

The circumstances surrounding the enactment of the 1890 Act indicate that the solution to the problems at Round Valley necessitated reduction and consolidation of the reservation and a complete separation of Indian lands from non-Indian settlements. The language used by the 1890 Act was precisely directed to that purpose. The words of section 2 of the 1890 Act emphasize a distinction being made by Congress between "the reservation established under the act of Congress approved March third, eighteen hundred seventy-three" and the *"reservation, as hereby established."* (Emphasis added). At another point in section 2 the 1890 Act refers to the *"reservation as herein established."* (Emphasis added). The language of section 3 of the 1890 Act further indicates this distinction between the 1873 reservation and the reservation established by the 1890 Act in providing: "That the remainder of the grazing and timber lands included in the *reservation as at present existing* shall be surveyed into tracts of six hundred forty acres each, and the boundary lines of the *reserved* lands shall be run and properly marked." (Emphasis added). There would be no need to use the qualifying phrase "at present existing" if the reservation were to retain its then current boundaries.

The use of the word "reduction" in the title of the 1890 Act ("An act to provide for the reduction of the Round Valley Indian Reservation . . . and for other purposes"), reinforces this indication of congressional intent to disestablish a portion of the reservation as recommended by the Dawes Committee. Although the title of the Act cannot enlarge or confer powers or control the words of the Act, the title may be helpful in interpreting ambiguities within the context of the Act. *Cornell v. Coyne*, 192 U.S. 418, 430 (1904); *see United States v. Union Oil Co.*, 343 F.2d 29, 32 (9th Cir. 1965). The clear intent of the statute is shown by the words "reduction of the Round Valley Indian Reservation." The use of these words in the title of the Act is a reflection of the recommendations of the Dawes Report that "measures should be taken to reduce the boundaries of this reservation to the present wants of these Indians."[12]

The living pattern of the Indians and non-Indians at Round Valley did not suggest that Congress needed or intended to continue reservation status on the relinquished lands. The lands opened for sale were largely within one contiguous body and were not inhabited by Indians. Non-Indians were removed from that portion of land reserved for the Indians. Thus, discontinuance of reservation status of the relinquished land did not jeopardize the Indians' use of the reservation lands specifically set aside to meet the Indian needs, because all non-Indians were removed. It therefore did not, at the time, result in a "checkerboard" jurisdiction between the state and federal government that was sought to be avoided. See *DeCoteau* 420 U.S. at 428; *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977); *City of New Town, North Dakota v. United States*, 454 F.2d 121 (8th Cir. 1972); *cf. Rosebud*. By defining a smaller, manageable reservation and removing the non-Indians from that reservation, the Indians were better

[12]S. Rep. No. 1522, *supra*, note 2, at 7-8.

served than by a larger reservation that was dominated by non-Indians whom the government had been unsuccessful in removing. This was the major purpose of the 1890 Act.

The district court indicated that the lack of a specific delineation of the boundaries of the reservation within the Act militates against finding a termination of a part of the reservation, 410 F. Supp. at 583. However, in our view, the congressional decision to set up a commission to establish boundaries, rather than to outline them within the Act itself, is immaterial to the issue of whether or not the reservation status of the land was continued. The method of defining the boundaries does not appear to us to relate to the purpose for which the boundaries were set.

The 1890 Act, when read as a whole and viewed against the background of the legislative history of the Act and the circumstances surrounding its enactment, evidences a congressional intent to reduce the size of the reservation, to consolidate and secure it for the Indians and to terminate the reservation status on the remaining lands that were opened for sale.

C. Subsequent Legislative and Administrative Interpretations of the Act.

Legislative and administrative interpretations of the 1890 Act, made contemporaneously with enactment or shortly thereafter, also indicate that Congress intended to reduce the size of Round Valley Indian Reservation and to disestablish that portion of the reserve opened for sale. Interpretations of a statute by those charged with administering and enforcing it, and their practices which reflect their understanding of the provisions they must implement, have been given deference by courts when faced with a problem of statutory construction. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). This is particularly true when the interpretation is a contemporaneous one, made soon after the time of enactment. *Udall v. Tallman*, 380 U.S. 1, 16 (1964).

The instructions issued by the Acting Commissioner of the Office of Indian Affairs to the three-person Round Valley Reservation Commission which was established by the 1890 Act reveal the Commissioner's understanding that the boundaries of the reservation were to be redefined and the size of the reservation reduced. In a November 3, 1890 letter from P.V. Belt, Acting Commissioner of the Office of Indian Affairs, to the three members of the Commission, Belt set out the duties imposed by the Act of 1890.[13] Belt stated that the three-person commission should "appraise the value of all improvements made by private persons or firms before the 3rd day of March, 1873, upon any of the lands included in the reservation . . . *and within the lands selected by you to be retained for the Indians.*" (Emphasis in original).[14] The letter also refers to the "[s]election of timber and grazing lands for the diminished reservation."[15] In assessing the overall effect of the 1890 Act, Belt stated:

> The manner in which this reservation has been controlled and possessed by white men, has been a standing reproach to the government for many years. The passage of the Act of October 1st, 1890, was urged by this Office, with a view to securing the tillable land of the reservation to the Indians in severalty, and of placing the Indians in undisturbed and sole use and occupation of a sufficient quantity of timber and grazing lands, the intruders to be driven from such lands.[16]

The Round Valley Reservation Commission Report itself also indicates the Commissioners' understanding that their responsibility was to reduce the size of the reservation. The majority report outlined the Commission's duty to appraise pre-1873 improvements upon land *"within the land selected . . . to be retained for the Indians"* (emphasis in original) and the Commission established the Eel River as the western boundary of the "territory to be retained"

[13]Letter from P.V. Belt, Acting Commissioner of the Office of Indian Affairs, to Round Valley Reservation Commission (November 3, 1890).

[14]*Id.* at 2-3.

[15]*Id.* at 4.

[16]*Id.* at 8.

for Indian use for grazing and timber.[17] The minority report specifically mentioned reservation boundaries.[18] In the minority report, Commissioner Hunt commented on the duty of "establishing the line and marking off the boundaries of the new reserve" and expressed his desire "to settle the boundaries of the new reservation."[19] He referred to the majority report's decision to "take within the new Reservation from 40 or 45 thousand acres" of upland, while he recommended taking only "25 or 30 thousand acres . . . for the new reserve."[20]

Other administrative documents reflect a congressional intent to reduce the size of the reservation in 1890. The Round Valley Reservation Commission selected approximately 43,680 acres of land for the new reservation from the approximately 102,000-acre reserve established in 1873. In the 1890 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, the acreage listed for the Round Valley Indian Reservation was 102,118 acres, as established by the 1873 Act.[21] However, in the 1891 Annual Report, issued after the work of the Round Valley Reservation Commission had been completed, the acreage for the Round Valley Indian Reservation was listed as 43,680 acres, as established by the 1890 Act.[22] Although appellees contend that acreage tables were often reduced to reflect the land allotted to Indians, this factor could not have been responsible for the acreage reduction at Round Valley between 1890 and 1891 because no acreage had been allotted.

[17]Report from D.W. Shryock, Chairman, Round Valley Indian Commission, to Commissioner of Indian Affairs 2 & 9 (March 10, 1891).

[18]Report from H.C. Hunt, Member, Round Valley Indian Commission, to Commissioner of Indian Affairs (undated, 1891).

[19]*Id.* at 3.

[20]*Id.* at 4-5.

[21]Fifty-Ninth Annual Report, by Commissioner of Indian Affairs to Secretary of Interior (1890).

[22]Sixtieth Annual Report, by Commissioner of Indian Affairs to Secretary of Interior (1891).

A letter from the Commissioner of Indian Affairs to the Secretary of Interior, dated March 30, 1892, stated that:

> Round Valley Commission, with its report dated March 10, 1891, submitted a plat which they certified to correctly show the exterior boundaries of the Round Valley Indian Reservation as reduced under the provisions of the act aforesaid to be as follows (description follows) . . .
>
> ***
>
> The report of the Commission fixing the boundaries of the reservation as above described was approved by the Department by letter dated July 8, 1891.[23]

In the 1893 Annual Report of the Commissioner of Indian Affairs, the Commissioner stated that:

> Since the last annual report of this office a Commission was appointed by the President to appraise the grazing and timber lands and improvements thereon included in the Round Valley Reservation as established under the act of March 3, 1873 (17 Stats., 633), but outside of the limits of the reservation as diminished by section 2 of the act of Congress approved October 1, 1890 (26 Stat., 658).
>
> ***
>
> The said lands are to be restored to the public domain and sold at public sale at a price not less than the appraised value, the proceeds of said sale to be placed at the credit of the Indians.[24]

Although appellees cite other administrative documents indicating some ambiguity among officials, it appears clear from the statements of the Round Valley Reservation Commission and from the Commissioner of Indian Affairs, who were charged with the primary responsibility of administering the 1890 Act, that it was their understanding

[23]Letter from Commissioner of Indian Affairs to Secretary of Interior 2-4 (March 30, 1892).

[24]Sixty-Second Annual Report, by Commissioner of Indian Affairs to Secretary of Interior, 34-35 (1893).

that Congress intended to reduce the size of the reservation.[25]

D. Subsequent History of State and Federal Jurisdiction.

In *Rosebud*, the Supreme Court noted that the subsequent jurisdictional history of the area was an important factor for consideration. The subsequent jurisdictional history of this area reinforces the view that reservation status terminated on the lands beyond the boundaries established under the 1890 Act. The record reveals that the federal government has not exercised jurisdiction over the land relinquished by the 1890 Act, and the State of California has exercised jurisdiction over this area.

Subsequent congressional references to the Act of 1890 also support the conclusion that Congress intended to reduce the size of the reservation. Consideration is given to subsequent legislation declaring the intent of a previous enactment. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co. v FCC*, 395 U.S. 367, 380-381 (1969); *C. Sands Sutherland, Statutory Construction*, §49.11, (4th ed. 1973).

In 1905, Congress passed "An Act To open to homestead settlement and entry the relinquished and undisposed of portions of Round Valley Indian Reservation, in the State of California, and for other purposes." 33 Stat. 706. The Act stated in part:

> That all lands relinquished from the Round Valley Indian Reservation, in the State of California, under an Act entitled "An Act to provide for the reduction of the Round Valley Indian Reservation . . ."
> approved October first, eighteen hundred and ninety, which have not heretofore been disposed of, shall be surveyed . . . The said lands when surveyed and appraised shall be subject to settlement and entry under the provisions of the homestead laws.

[25]In 1938, the Solicitor of the Department of Interior issued an opinion, which stated that the restoration clause applies both to lands which are part of an existing reservation and to lands which were part of a reservation at the time the land was opened for sale. *See* 56 I.D. 330, 333 (1938).

By referring to the lands affected by the 1905 Act as the portions "relinquished" under the 1890 Act which provided for a "reduction" of the reservation, it is clear that the 1905 lawmakers understood that the 1890 Act had reduced the size of the reservation.

References to the 1905 Act in the congressional debates confirm this understanding. In reporting the 1905 bill to the House of Representatives, the Committee on Public Lands stated in its report that "[t]he lands affected by this bill were originally a part of the Round Valley Indian Reservation."[26] Also, during debate in the House, the bill's sponsor, Representative Bell, stated:

> I desire to state to the Members of this House that this bill . . . has passed the Committee on Public Lands of the Senate unanimously. It is a meritorious bill. A few men have gone in and settled upon the lands that were *cut off from the* [Round Valley] *Reservation* in California about fourteen years ago. This bill is for the purpose of giving these men the right to perfect title by paying whatever the land be appraised for.
>
> The money, when it is paid into the United States Treasury, is to be credited to the Indians of the Round Valley Indian Reservation. (Emphasis added).[27]

During a later debate on the bill, Mr. Bell also stated:

> In 1890 the Congress of the United States came to the conclusion that the *reservation was too large and ought to be reduced, and on the 1st day of October, 1890, a law was passed in Congress reducing the reservation* and authorizing the President of the United States to allot to the Indians in severalty as much agricultural land as he thought they should have, and also timber and grazing lands. After that allotment had been made by the President of the United States there remained some 64,000 acres of land cut off from the reservation . . . [O]n the 19th day of April they were offered for public sale but only 1,200 acres out of some 64,000 acres were sold. (Emphasis added).[28]

[26]H.R. Rep. No. 2370, 58th Cong., 2d Sess. 1 (1904).

[27]38 CONG. REC 5849 (1904).

[28]39 CONG. REC. 398-99 (1904).

Reference made by other congressmen to the bill mention a "sale of reservation lands."[29] But, these references are ambiguous since they may refer either to land presently considered part of the Round Valley Indian Reservation or to former reservation land.

In 1947, pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, the Secretary of the Interior restored 7,531 acres of the unsold lands severed from the Round Valley Indian Reservation by the Act of 1890. The Secretary acted pursuant to both §3 and §7 of the Act. Section 3 authorized him to restore to tribal ownership unsold, opened lands and §7 authorized him to add other lands to existing reservations. Thus, we cannot conclude from the Secretary's order whether the Secretary viewed his actions as a restoration of lands which retained their reservation status or as an addition of land which has previously been terminated from the Round Valley Indian Reservation.

III

CONCLUSION

Appellees argue that the "reduction" of Round Valley Indian Reservation was not meant to decrease the size of the reservation because the 1890 Act was passed at a time when the prevailing government policy was to assimilate Indians into the culture of the non-Indian settlers; and thus, the approach of the allotment system was to allot reservation land severally to Indians and to sell the surplus to settlers within the reservation, while leaving the original reservation boundaries intact. Although the rationale for the allotment under some statutes was to promote the integration and assimilation of Indians into non-Indian culture, this was not a goal of the 1890 Round Valley legislation. To the contrary, the intent of Congress was to

[29] 38 CONG. REC. 5849 (1904).
39 CONG. REC. 398-403 (1904).

provide the Indians with a separate reserve where they would be secure from non-Indian encroachment. The Act of 1890 removed the non-Indians from the reservation, rather than integrating them with the Indians, because of the problems which had occurred in the past on that reservation.

It is clear to this court that the intent of Congress in enacting the 1890 Act was to reduce the size of Round Valley Indian Reservation and to abolish reservation status of the opened lands. This intent is shown by the circumstances existing at Round Valley prior to 1890, by the legislative history of the Act, and by the language of the Act itself which was designed to meet the specific situation at Round Valley. The particular problems of the Round Valley Indians required a solution that reduced, consolidated and secured the reservation for the exclusive use of Indians, and that opened and relinquished lands for sale to those who sought legitimate title to the land. The Act of 1890 was enacted to effect this solution.

REVERSED.

HOFFMAN, District Judge, dissenting:

The persuasive effect of an excellent majority opinion makes it difficult to dissent. The ultimate question is, of course, the effect of the Act of 1890, 26 Stat. 658, upon the admitted establishment of the Round Valley Indian Reservation by the Act of 1873, 17 Stat. 633. If the Act of 1890 disestablished the rights of the tribe to the previously established boundary lines created by the Act of 1873 (except for approximately 43,860 acres of both valley and mountain lands which were admittedly still reserved as the Round Valley Indian Reservation by the Act of 1890), then the majority is correct in its analysis of the problem.

If however, the effect of the Act of 1890 was merely to "open up" the 63,680 acres for non-Indian settlement, or if the Act of 1890 is ambiguous as to its effect, then the district court must be affirmed.

I

I start with the premise that, as a general rule, ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 484 (1979); *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973), in which case the Supreme Court said:

> "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the . . . Act. This being so, we are not inclined to infer an intent to terminate . . . A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

II

The question as to whether the Act of 1890 so divorced the 63,680 acres from "Indian Country" as defined by 18 U.S.C. §1151, and thus terminated that area as a part of the Indian reservation under the jurisdiction of the United States Government as created by the Act of 1873, is not so readily determined as the majority opinion suggests. There are indeed, implications which suggest a termination, but in my judgment too much ambiguity exists as to what Congress intended at the time of the passage of the Act of 1890. As stated in *United States v. Celestine*, 215 U.S. 278, 285 (1909), "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." And a congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. *Mattz, supra* at 505; *Seymour v. Superintendent*, 368 U.S. 351

(1962); *United States v. Nice*, 241 U.S. 591 (1916). In *Mattz*, the Supreme Court quoted with apparent approval the language from *United States ex rel Condon v. Erickson*, 478 F.2d 684, 689 (8th Cir. 1973), by noting "a holding favoring federal jurisdiction is required unless Congress has *expressly or by clear implication* diminished the boundaries of the reservation" opened to settlement. In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977), decided after the district court opinion in the instant case, the requirement was restated as a "congressional determination to terminate an Indian reservation must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

My analysis of the operative language in the 1890 Act does not persuade me that, at least on its face, there was any congressional intent to disestablish the Round Valley Indian Reservation. In fact, but for the title or caption which states "An act to provide for the *reduction* of the Round Valley Indian Reservation, in the State of California, and for other purposes"[1](emphasis supplied), I find little or no indication of such an intent to terminate the "Indian Country" as to the 63,680 later surveryed, appraised and put up for public sale. Indeed, Section 3, relating to the 63,680 acres, refers to the 'reservation as at present existing", and there are no such words appearing in the Act of 1890 which point to "disestablishment", "discontinuance", "abandonment", "relinquishment", "termination", "cession", "sell", "vacate", "surrender", "abolish", and words of like import, of any portion of the Round Valley Indian Reservation as created by the Act of 1873.

[1]The title of a statute is not a part of that statute and cannot alter the plain meaning of the text. *Railroad Trainmen v. B. & O. R. Co.*, 331 U.S. 519, 528-529 (1947); *United States v. Union Oil Co.*, 343 F.2d 29, 32 (9th Cir. 1965). The word "reduction" is susceptible to two interpretations, one which does actually reduce the Reservation and alter its boundaries; the other merely reducing the amount of land within the Reservation held *exclusively* by Indians. Cf. *Bryan v. Itsaca County*, 426 U.S. 373, 384 N. 11 (1976).

Judge Renfrew, in his opinion, reported at 410 F. Supp. 579 (1976), has cogently pointed out his reasons why the use of the word "reduction" did not operate to terminate the "Indian Country" in the area where the deer was killed by Russ and Whipple, the two enrolled members of the Indian tribe. He correctly suggests the analogy to *United States v. Erickson*, 478 F.2d 684 (8th Cir. 1973), where the operative language of an Act of 1908, 35 Stat. 460, made reference to "reservations thus diminished," and the Eighth Circuit found that "diminished" merely referred to the area allotted to the Indians.

The Act of 1873 had the effect of reducing the size of the previously existing Round Valley Indian Reservation under Section 1 of the Act where Congress provided that the southern area be "restored to the public lands of the United States", and thereafter sold. Section 2 of the 1873 Act creates a new reservation by metes and bounds description. Section 3 provides that the President shall cause to be withdrawn from sale or entry under the homestead and pre-exemption laws, the entire area specified by metes and bounds under Section 2, and likewise states that all settlers now residing upon the tract (consisting of approximately 102,000 to 106,000 acres) be required "to remove therefrom" as soon as they shall be paid the appraised value of any improvements then existing. Thus, the Act of 1873, in clear and unmistakable language, (l) restored a portion of an existing Indian Reservation to the *public* lands, (2) created by metes and bounds an Indian Reservation which was encompassed within the former Reservation, and (3) caused an affirmative act by the President to withdraw from sale or entry the area created under (2).

Matters affecting jurisdiction were relatively unimportant in the period from 1873 to 1890, and for some years thereafter. In 1953, Congress enacted 18 U.S.C. §1162 and, under (a), California was given jurisdiction over offenses committed by or against Indians in all areas of Indian coun-

try within that state, but under (b) there is a specific disclaimer of jurisdiction with regard to state regulation of Indian hunting, trapping or fishing rights. Since the confiscation of the deer grew out of the hunting rights reserved to Indians, the jurisdiction issue is of prime importance in this case.

Three years prior to the enactment of the controversial Act, i.e., the Act of 1890, Congress enacted the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. §331, *et seq.* The majority places major emphasis on the Dawes Report of 1885 which does recommend that the Round Valley Indian Reservation boundaries be altered. My analysis of the Dawes Report is that it led to the passage of the General Allotment Act of 1887,[2] and not to the Act of 1890. Congress, confronted with its action in 1887, was not persuaded to disestablish a portion of the Round Valley Reservation in order to make it available for non-Indian settlement. As the Supreme Court said in *Mattz, supra*, 412 U.S. at 96:

> "That Act [the General Allotment Act of 1887] permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting inter-action between the races and of encouraging Indians to adopt white ways."

[2]The General Allotment Act was known as the "Dawes Act". It was enacted in an attempt to reconcile the Government's responsibility for the Indians' welfare with the desire of non-Indians to settle upon reservation lands. *DeCoteau v. District County Court*, 420 U.S. at 432. Congress, in the years prior to 1890, was thoroughly familiar with appropriate disestablishment language as evidenced by *DeCoteau* and the contrary language as reflected by *Mattz* and *Seymour*, the latter two cases being unilateral in character as is the present controversy.

Thus, Congress could open a portion of the Reservation to non-Indian settlement without altering its reservation status and allot the remainder to the Indians. Since, in 1885, there were only an estimated 500 to 800 tribal Indians in the Reservation, it is a fair assumption that Congress concluded that all lands would soon be allotted, the trust would expire, and the reservation could be abolished. *Mattz*, 412 U.S. at 496. It was in this setting that the Act of 1890 was enacted. It is my view that the Dawes Report of 1885 led to the passage of the General Allotment Act of 1887, but furnishes no basis for concluding that the disestablished recommendations in the report prompted the passage of the Act of 1890. In this respect, I have a substantial difference of opinion from that of the majority.

The United States was not to purchase any portion of the Reservation under the 1890 Act. In Section 3, the United States was to act solely as a trustee for the Indians in selling a portion of the Reservation to non-Indians. Stated otherwise, the land sold would pass from the Indians through private purchases, but it was not first made a part of the public domain. Under the 1873 Act, it is noted that certain lands were expressly "restored to the public lands of the United States", with the proceeds of any sales "hereby restored" being used to pay for the improvements or claims of settlers within the "new Reservation" and for the improvement of Indians on the restored lands. The funds derived from sales under the 1873 Act were not credited to the Indians as a whole, as contrasted to the 1890 Act where the proceeds were "placed in the Treasury of the United States to the credit of said Indians". While it is true that *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 588, tends to minimize the effect of any changed method of payment, the Supreme Court merely stated that such a factor was "not conclusive with respect to congressional intent". Nevertheless, it still remains a factor for consideration. Indeed, as far as *Rosebud* is concerned, I agree with its analysis as stated by the Eighth Circuit (the same court

which previously decided *Rosebud*) in *United States v. Long Elk*, 565 F. 2d 1032, 1036-1039 (8th Cir. 1977), which emphasized that *Rosebud* was decided on two crucial factors: (1) that the Act contained cession language "precisely suited" to disestablishment, and (2) the legislation originated in an agreement between the tribe and the Government unequivocally calling for the cession of reservation lands. Neither factor in *Rosebud*, I submit, is present in this case.

Finally, California urges that Section 2 of the Act of 1890 uses the words "the reservation as hereby established" and "the reservation as herein established", which would tend to indicate an intent to establish a new reservation for the Indians. But these words must be read in conjunction with prior words in the same section which refer to "within the lands selected and retained for the Indians" which words assuredly do not constitute clear disestablishment language. Aside from the words used by Congress, it is important to realize the population situation in the Round Valley Indian Reservation prior to 1890. While in many Indian reservations throughout the country there existed "familiar forces [of a] nearby and growing population of white farmers, merchants, and railroad men . . .urging authorities in Washington to open the reservation to general settlement", [3] such was not the situation in Round Valley as reflected by the fact that only two buyers appeared when the 63,642 acres of Round Valley were offered for sale on April 19, 1894, thus leaving 98% of the opened land unsold because of lack of interest. Additionally, trespassers had occupied a large portion of the reservation lands created by the 1873 Act and had not moved therefrom despite the mandate of the Act of 1873. Congress knew all of these facts prior to the passage of the 1890 Act as there were references to same during the House floor debate. Congress responded, in an attempt to ameliorate the existing conditions which included blood-

[3] *DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975).

shed and inter-racial violence, by designating specific and discrete zones of Indian and non-Indian occupancy on the reservation as created in 1873. The "establishment" which Congress had in mind was a rearrangement to accommodate the three conflicting interests which were apparent at the time.

I respectfully submit that the face of the Act of 1890 does not demonstrate any expression to terminate.

III

As commanded by *Rosebud* and other authorities, it is required that we look to the "legislative history". Other than the Dawes Report heretofore mentioned, bills were introduced in 1886 and 1888 during the administration of President Cleveland but which failed of passage. The 1886 bill provided "for allotments of lands in severalty to Indians residing upon the Round Valley Indian Reservation . . . and for granting patents therefor, and for other purposes." In all probability the 1886 bill did not pass because of the pendency of the General Allotment Act which was enacted on Februrary 8, 1887. In 1888, a new title was needed because the reference to "allotments" in the 1886 bill was no longer needed due to the enactment of the General Allotment Act. The 1888 bill picked up Senator Dawes' non-specific reference to "reduction" as contained in his 1885 report. After the General Allotment Act, the policy was directed at extinguishing Indian title to opened lands only if and when such lands were actually purchased by settlers. See Letter of Commissioner to Secretary of Interior, August 10, 1934, referring to policy starting about 1890 and continuing until at least 1910.

I do not find from the pre-1890 legislative history any clear intent to disestablish the reservation set forth in the 1873 Act.

IV

After 1890, Congress again addressed the Round Valley Indian Reservation matter in 1904 when a bill was presented with a title "To *open* to homestead settlement and entry the *relinquished* and undisposed of portions of the Round Valley Reservation" (emphasis supplied).

This bill, finally enacted on February 8, 1905, 33 Stat. 706, was made necessary because only 1223 of the 63,642 acres opened by the Act of 1890 were actually sold as the 1890 Act required sales in parcels of 640 acres and payment had to be made in full. The bill reduced the size of the parcels to 160 acres and allowed the purchasers to pay in five equal annual installments. The legislative history demonstrates that at least Congressman Livernash of California clearly considered the opened lands as a part of the Round Valley Indian Reservation, 39 Cong. Rec. 5849, 58th Cong., 2nd Sess., although the Senate Report, No. 2618, 58th Cong., 2nd Sess., implies that the opened lands were no longer a part of the reservation where it states "the lands affected by this bill were originally a part of the Round Valley Indian Reservation." Here, the title to the bill, for what it may be worth, operates to the benefit of the Indians.

The legislative history of the 1905 Act is inconsistent and confusing. In any event, it does not demonstrate any clear intent by Congress to diminish the Reservation or to suggest that the 1890 Act had already done so.

We come to the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U.S.C. §461, *et seq.* Under Section 3, the Secretary of Interior is authorized to "restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States." Section 7 provides that the Secretary is authorized to "proclaim new Indian reserva-

tions on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations." The legislative history of the 1934 Act (S. Rept. No. 1080, 73d Cong., 2d Sess., H. Rept. No. 2049 (Conference Report), 73d Con., 2d Sess., the latter adopting the Senate version of Section 7) makes reference to the interplay of Sections 5 and 7. Section 7 permits the Secretary "to proclaim new Indian reservations on lands acquired" with the Senate Report adding "pursuant to Section 5 of the bill". When one examines Section 5, it states that the Secretary is authorized to "acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . ., within or without existing reservations, . . . for the purpose of providing land for Indians." Section 3 contains no authority to "acquire" lands and it deals only with the restoration of surplus lands to tribal ownership.

In the Opinion of the Solicitor, 54 I.D. 559 (1934), the Round Valley Reservation was listed as eligible for restoration of lands under Section 3 of the Act of 1934. In 1938, the Solicitor of the Department of Interior attempted to clarify the 1934 opinion by stating that Section 3 does not mean the lands must now have the character of Indian reservation lands and need not be located within the geographical limits of an Indian reservation. 56 I.D. 330, 333 (1938). On November 18, 1946, a memorandum from the Assistant Commissioner of Indian Affairs to the Secretary of the Interior was submitted. It recommended that the unsold lands be restored to tribal ownership and, at one point, stated that the unsold lands should be "added to" the Round Valley Reservation. The Secretary approved the memorandum as being an operative order; there does not appear to have been any separate restoration order entered by the Secretary.

I do not feel that the 1947 secretarial order purportedly "restoring" 7531 acres of unsold lands to the Round Valley Indian Reservation has any effect on the case. California argues that it suggests that the Act of 1890 definitely took

this acreage away from the reservation. On the other hand, the memorandum indicating the purpose of the "Order of Restoration" was "to add to the said Round Valley Reservation all lands which remain vacant and undisposed of on the opened portion of the said reservation", thus implying that its purpose was merely to restore possessory rights which had been divested by the Act of 1890.

V

Rosebud stresses the importance of a Presidential Proclamation which, in *Rosebud*, "is an unambiguous, contemoraneous, statement by the Nation's Chief Executive, of a perceived disestablishment of Gregory County [from the Rosebud Reservation]". As noted by Mr. Justice Rehnquist speaking for the majority, "It reflects, we believe, the clear import of the congressional action in the 1904 Act." *Rosebud*, 430 U.S. at 602-603. Likewise, in *DeCouteau* and *United States v. Southern Pacific Transp. Co.*, 543 F. 2d 676, 693 (9th Cir. 1976), there are references to presidential proclamations which use the words reflecting that the Indians had "conveyed . . . all their title and interest in and to all the allotted lands" and "have ceded and relinquished . . . all their right and claim in and to all the lands . . . which have not been allotted, selected, set apart and reserved". And in *Long Elk*, the presidential proclamation used no words of termination or disestablishment with the Eighth Circuit suggesting that this was an indication that there was no intention to terminate a portion of the reservation.

As to the Round Valley Indian Reservation, there was no presidential proclamation or any formal executive order implementing the Act of 1890. The Act itself mentioned no boundaries but merely set aside a "reasonable amount" of land for the exclusive use and allotment to Indians.

While the absence of a presidential proclamation is not *per se* conclusive, it is rather significant to note that in the

majority of cases holding that reservation lands have not been disestablished, there was either no presidential proclamation, as in this case and *Mattz*, or the proclamation contained no words akin to disestablishment language and merely stated that portions of the reservation would be opened to entry and settlement, as in *Seymour*, *Erickson*, *Long Elk*, and others. Thus, it appears that courts have placed major emphasis on the wording of the presidential proclamations to reflect the congressional intent.

VI

It is quite true, as the majority notes, that California has probably exercised more jurisdiction over the area covered by the 1890 Act than has the federal government. The duties of the federal agent were directed to the management of parcels of land held in trust by the United States, either for individuals or for the Indians collectively. He agreed that no significance could be attached to the line which California now contends was the post-1890 exterior boundary of the reservation. The State game warden testified that he enforced California's fish and game laws against all violators, except as enrolled members of the Covelo Indian Community on lands held in trust by the United States. He determined the trust status of land by reference to a map furnished by the Bureau of Indian Affairs—not by any boundaries of the reservation. The line purporting to be a boundary line indicated nothing to him.

It is apparent that, in the exercise of jurisdiction, no official, state or federal, historically paid any attention to any exterior boundary. Their interest was whether a particular area was in trust status.

The very nature of the 60% of the Reservation which was opened for settlers by the Act of 1890 suggests that only hunting and fishing could be a "justifiable expectation" of use by Indians and non-Indians alike. The Congressman for that area described the opened lands as

"rugged and mountainous and hardly habitable for human beings". While post-opening jurisdictional history of reservation lands opened to non-Indians is a factor usually considered, such as in *Rosebud* and *DeCouteau* where "justifiable expectations" on the part of non-Indians were upheld, this case presents no such "justifiable expectation" as there has never been a demand for the rugged and mountainous land which was opened to settlers in 1890.

At best, the exercise of jurisdiction by California has been essentially limited to occasional visits by a game warden in the surrounding hills. While it may be conceded that this exceeds the exercise of jurisdiction by federal authorities, it is extremely doubtful whether this is sufficient in law to have any bearing on this case, especially since this case involved hunting rights. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974).

As noted, by the order of 1947, a total of 7531 acres, in random small parcels of 140 acres each, were restored to Indian use in 1947. This presents the problem of "checkerboard jurisdiction" which was denounced in *Seymour*, 368 U.S. at 358, and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478 (1976). In *Long Elk*, 565 F.2d at 1039 (8th Cir. 1977), the court observed that law enforcement officers would be required to consult tract books to determine the locus of a criminal act, and "such an impractical result is not to be imputed to Congress without specific language to that effect."

I do not now believe that the surrounding circumstances are sufficient, despite the limited post-1890 exercise of jurisdiction, to establish a clear congressional intent of disestablishment.

VIII

Mindful of the fact that there are statements found in letters and documents tending to show that there are persons who believed that a portion of the Round Valley Indian Reservation had been disestablished by the Act of 1890, I nevertheless submit that confusion existed at that time, and continues to exist, as to the true congressional intent. Certainly, as stated in *Long Elk*, 565 F.2d at 1040, there was no "hard evidence necessary to overcome the general presumption against an intent to disestablish a reservation." I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOSEPH A. RUSS, et al.,

Plaintiffs,

and

COVELO INDIAN COMMUNITY
OF THE ROUND VALLEY
INDIAN RESERVATION

Plaintiff in Intervention,

vs.

RICHARD E. WILKINS, et al.,

Defendants

No. C-73-2279-CBR

MEMORANDUM OF OPINION

This case raises the questions of the exact boundary of the Round Valley Indian Reservation (Reservation) in Mendocino County, California, and whether the State of California has jurisdiction to regulate hunting upon that Reservation.

On April 15, 1973, plaintiffs Russ and Whipple, two enrolled members of the Covelo Indian Community of the Reservation, shot a deer on land they claim is part of the Reservation. The land in question is located within the boundary of the Reservation defined by Congress in 1873.

PREVIOUS PAGE WAS BLANK

Act of March 3, 1873, 17 Stat. 633 (Act of 1873), but is outside the area selected and retained for the Indians pursuant to the Act of October 1, 1890, 26 Stat. 658 (Act of 1890).[1] The plaintiffs were apprehended and the deer confiscated by defendant Wilkins of the California Department of Fish and Game, who denies that the locus of the shooting was within the present Reservation and asserts jurisdiction in any event under California law.

Plaintiffs Russ and Whipple brought this action against Wilkins and the Director of the California Department of Fish and Game seeking $100 damages for the value of the confiscated deer and declaratory and injunctive relief establishing the right of plaintiffs and other members of the Covelo Indian Community to hunt and fish on all portions of the Reservation defined by Congress in 1873. Plaintiff in Intervention Covelo Indian Community of the Round Valley Reservation seeks declaratory relief to establish (1) its sole authority to regulate all hunting and fishing on the Indian country of the Reservation, and over the rivers and streams surrounding the Reservation, as to Indians and non-Indians alike, and (2) the exact boundary of the Indian country of the Reservation. It also seeks injunctive relief to restrain defendants from enforcing California Fish and Game law on the Reservation. The action has been tried on a bifurcated basis, the first phase of which is to determine whether the disputed land is part of the Reservation.

History of the Reservation

The Round Valley[2] was originally selected for Indian purposes by the Department of the Interior in 1856. It became the home of Yuki, Wylackie, Nevada, Concow, and

[1] The Act of 1890 provided for a commission which would select a portion of the Reservation for the Indians. Refer to the procedures set up in the Act. 26 Stat. 659.

[2] The Round Valley briefly had also been known as the Valley of Nome Cult.

Indians of other tribes, many of whom had been displaced from other areas of California. In 1870, pursuant to the Four Reservations Act, Act of April 8, 1864, 13 Stat 39, President Grant established the Reservation by executive order and expanded the original tract by approximately 6,000 acres.[3]

A major revision of the Reservation was undertaken by Congress in the Act of 1873. 12,000 acres of Reservation agricultural land were "restored to the public lands". As compensation, 89,000 acres of generally mountainous land to the north were added to the Reservation. The 1873 Reservation was approximately 102,000 acres in size.

The record in this case establishes, however, that the Indians had a very limited enjoyment of the lands allocated to them by Congress. Ranchers and land speculators had begun to enter the area in the 1850's and often laid claim to the lands pursuant to the Swamp Lands Act, 9 Stat. 519, which vested title in the states to lands which were "overflowed" or "swamp" in character and thereby unfit for cultivation. By 1875, over 97,000 acres of the Reservation were occupied by non-Indians, and the 800 Reservation Indians were confined to an area of no more than 5,000 acres. The Committee on Indian Affairs, in investigating this problem in 1885, found that there were only nine settlers who could legitimately claim 160 acres each, and that the rest of the claims were without any legal basis.[4] The Reservation Indians were afraid to travel on the Reservation at large, and their cattle were often stolen in large numbers.[5]

[3] Kappler, Indian Affairs, Laws and Treaties, Vol. 1, pp. 824-828 (1904).

[4] Committee on Indian Affairs, Report. No. 1522, U.S. Senate, 48th Cong., 2d Sess. (Feb. 27, 1885, ser. #2274), p. 2.

[5] *Id.* pp. 2-3; and Report of General O.O. Howard, U.S.A., to Adjutant General, U.S.A., Sept. 14, 1887 (National Archives).

On October 1, 1890, Congress again dealt with the Reservation in "An Act to provide for the reduction of the Round Valley Indian Reservation in the State of California and for other purposes" (Act of 1890). The Act of 1890 provided that a portion of the Reservation was to be allotted in ten-acre tracts to individual Indians and that additional lands were to be held for the Indian community in common. (See the "General Indian Allotment or Dawes Act", Act of February 8, 1887, 24 Stat. 388.) All claims by non-Indians within these Indian allotted portions were to be appraised and compensated. The remainder of the Reservation was to be surveyed into 640-acre tracts and put up for sale with the proceeds, after deduction of certain expenses, placed in the Treasury of the United States to the credit of the Indians. The Act appointed a commission to carry out the actual division and allotment of the Reservation. The commission allotted the southwest portion of the Reservation to the Indians and offered the rest at public sale. Only 1,223 acres[6] were actually sold out of the 63,600 acres offered and, consequently, Congress later amended the Act of 1890 to reduce the plot sizes from 640 acres to 160 acres in size. Act of February 8, 1905, 33 Stat. 706.

The last change in the Reservation was effected pursuant to the Wheeler-Howard Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §463(a). Section 3 of that Act provides, in pertinent part, that the Secretary of the Interior may "restore to tribal ownership the remaining surplus lands of any Indian reservation" previously opened to sale. In 1947 the Secretary of the Interior restored the unsold portions of the Reservation which had been offered for public sale by the Acts of 1890 and 1905. The restored areas totaled about 7,531 acres.

[6] There is no explanation of the irregular figure.

Boundary of the Reservation

The threshold issue before the Court is whether the "reduction" of the Reservation by the Act of 1890 was intended by Congress to restore the northern portion of the Reservation to the public domain or to merely hold it as surplus Reservation land. The Court follows the rule in *Mattz v. Arnett*, 412 U.S. 481, 505 (1973), that "[a] congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history". Such an intent will not be imputed, and "'doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith'". *DeCoteau v. District County Court*, 420 U.S. 444 (1975), quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). On many occasions Congress has unilaterally terminated sections of reservations by restoring them to the public domain, and indeed had done so to an earlier portion of the Reservation in 1873. At that time Congress used express language to terminate the reservation status of lands and return them to the public domain. The Act of 1873 specifically "restored to the public lands" the 12,000 acres it severed from the Reservation. Similar unequivocal language was used in 27 Stat. 63 (1892), which "vacated and restored to the public domain" part of the Colville Indian Reservation in the State of Washington. *Seymour v. Superintendent*, 368 U.S. 351, 354 (1962). See also 15 Stat. 221 (1868) in which "the Smith River Reservation is hereby discontinued" and 33 Stat. 218 (1904) in which "the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished". *Mattz v. Arnett, supra*, 412 U.S. at 504, n. 22. Similarly, the 1889 Sisseton-Wahpeton Agreement, ratified by Congress on March 3, 1891, 26 Stat. 1035, provided that the tribes involved "hereby cede, sell, relinquish and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands . . . ", quoted in *DeCoteau v. District County Court, supra*, 420 U.S. at 456.

There have been disposals of reservation lands, however, in which termination was not the intent of Congress. In these instances, it was congressional policy to allot acreage to the Indians and to issue patents at public sale to unneeded reservation lands. That such patented lands are to continue to be included within the reservations is made clear by 18 U.S.C. §1151, which defines "Indian country", in pertinent part, as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent". This allotment policy was codified in the General Allotment Act of 1887, 24 Stat. 388, commonly referred to as the Dawes Act. It was designed to "continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing." *Mattz v. Arnett, supra*, 412 U.S. at 496. Any surplus land could be offered for sale to the public, with the proceeds to be placed in trust for the Indians. Sale of the surplus lands in an allotment context, without express severance from the reservation, cannot be interpreted to destroy the reservation status of the land. *Mattz v. Arnett, supra*, 412 U.S. at 497; *Seymour v. Superintendent, supra*, 368 U.S. at 355-356. A number of statutes were enacted under the allotment and sale policy of the Dawes Act which did not terminate the overall boundaries of reservations.[7] It is not immediately apparent, however, whether the Act of 1890 should be placed among those statutes which terminate reservation land or those which continue reservation land under patent. The word "reduction" under consideration here is unique among the

[7] See, *e.g.*, Act of June 17, 1982, 27 Stat. 52, allotting and opening for sale land on the Klamath reservation, considered in *Mattz v. Arnett, supra*, 412 U.S. at 494-495; Act of March 22, 1906, 34 Stat. 80 (Colville reservation), considered in *Seymour v. Superintendent, supra*, 368 U.S. at 354-355; Act of May 29, 1908, 35 Stat. 460 (Cheyenne River reservation), considered in *United States v. Erickson*, 478 F2d 684 (8 Cir. 1973); Act of June 1, 1910, 36 Stat. 455 (Fort Berthild reservation), considered in *The City of New Town, North Dakota v. United States*, 454, F.2d 121 (8 Cir. 1972).

cases and statutes the parties have cited.

Unlike those cases where the courts have found the intent to terminate, there is no express language "abolishing", "discontinuing", "restoring to the public lands", or "ceding all claim, right, title, and interest" in reference to the disputed lands here. Defendants argue that "reduction" has the same force and effect as the other phrases found to have caused a termination in other cases. However, such a Congressional intent is not clear from the face of the Act. Reduction is not synonymous with discontinuation, abolishment, restoration, or cession. Hence, we turn to the legislative history in which the word "reduction" was used.

The word "reduction" first appears in Senate Report No. 1522, 48th Cong., 2d Sess. (Feb. 27, 1885, ser. #2274). The Committee recommended that the Reservation be "reduced" to the current wants of the Indians and that the balance of the Reservation be sold and the proceeds put in trust for the benefit of these or other Indians. The Chairman of that Committee was Senator Dawes, the author of the General Allotment Act of 1887. As has been stated above, the policy of the 1887 Act was to continue lands opened for sale to the non-Indian public within the reservation system. The 1885 report by Chairman Dawes reflects the same intent. There were unsuccessful bills in 1886 and 1888 which also clearly reflect allotment and patent provisions and which were otherwise very similar to the Act of 1890. The legislative history does not make "clear" that the object of the Act of 1890 was to restore part of the Reservation to the public lands. Although most of the land had been occupied by settlers for many years, the 1885 report was clear that most of these claims were without any legal basis.

Defendants next argue that even if the Act does not, on its face, mandate any change in the size of the Reservation, it was implied in such a manner as to create a distinct and new smaller Reservation. Thus, we must examine the sur-

rounding circumstances, including similar statutes interpreted by other courts, and the manner in which Congress effected the "reduction" of the Reservation.

In analyzing the meaning of a "reduced" Reservation, the Court is assisted by a decision which considered the word "diminished" to be consistent with continued reservation status. *United States v. Erickson*, 478 F.2d 684 (8 Cir. 1973), examined the Act of May 29, 1908, 35 Stat. 460, which opened reservation lands to settlement and referred to the "reservations thus diminished". That court found that "diminished" merely referred to the area allotted to the Indians; the opened portion was still reservation land and the original boundary was unaffected. 478 F.2d at 686-688. *Mattz v. Arnett, supra*, 412 U.S. at 498-499, holds that referring to a reservation in a "past tense" is merely a natural, convenient and shorthand way to identify the area for allotment, and does not indicate any clear purpose to terminate the reservation. The fact that Indians had abandoned an area and white settlers had moved onto the land also does not affect continued reservation status. 412 U.S. at 499. Set forth in an appendix to this Memorandum of Opinion are the leading cases which have construed certain operative language in various statutes affecting Indian reservations and which have found continuations of land within reservations, on one hand, and terminations of Indian country, on the other.

A description of any precise areas to be opened or terminated from the Reservation is conspicuously lacking from the face of the Act of 1890. When the Act of 1873 restored 12,000 acres to the public lands, the area to be restored was delineated by metes and bounds. In the statutes which have been recognized as terminating reservation lands (refer to the appendix hereto), the terminated areas are also precisely identified, either by metes and bounds or otherwise. In 27 Stat. 63, considered in *Seymour v. Superintendent, supra*, 368 U.S. 351, and 33 Stat. 254, considered in *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8

Cir. 1975), metes and bounds were utilized. In 26 Stat. 1035, 1036, considered in *DeCoteau v. District County Court, supra*, 420 U.S. 444, portions of the Lake Traverse Reservation had previously been allotted to the tribes there and the termination of the "unallotted lands" had a specific geographical meaning. In 15 Stat. 221 and 33 Stat. 218, noted in *Mattz v. Artnett, supra*, 412 U.S. at 504, n.22, the entire reservations were terminated. The vagueness of the Act of 1890 in affecting any particular area is a factor which militates against finding a termination of a specific part of the Reservation.

Defendants point out that the Commission recommended an unusually distinct boundary around the Indian area, whereas allotments usually resulted in "checkerboard" boundaries between Indians and settlers. See *Seymour v. Superintendent, supra*, 368 U.S. at 358; *Mattz v. Arnett, supra*, 412 U.S. at 495. However, the rather specific segration of Indian from non-Indian patent areas is well founded in the Reservation's history. The Reservation has had a tragic history whereby proximity to settlers has resulted in a disappropriation of land from the Indians. Furthermore, the open-range system in Round Valley has resulted in a significant number of cattle belonging to the Indians, being intermingled with the herds of cattle of the settlers, being lost or stolen. The unusual allotment boundary here is not sufficient evidence of a termination of the northern portion of the Reservation.

The Court does not find, from the face of the Act of 1890 or the surrounding circumstances,a clear intent by Congress to terminate the disputed land from the Reservation. "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909). Therefore, all land within the 1873 boundary is still Reservation land and is Indian country, subject to existing patents as defined in 18 U.S.C. §1151.

It will now be necessary to proceed to the second phase of the trial to determine whether the State of California has jurisdiction to regulate hunting and fishing on the Reservation.

Dated: March 22, 1976.

Charles B. Renfrew
United States District Judge

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTE:

Apparently the Court of Appeals has not prepared a separate document as its judgment in this case. However, it did send to petitioner's counsel of record, along with a copy of its opinion which was filed on August 1, 1980, a document entitled "Notice of Entry of Judgment" which states that "Judgment was entered in this case as of the file stamp date on the attached decision of the court."

If the petition is granted, or if the Court should so desire, counsel for petitioner will obtain such a separate document embodying the judgment of the Court of Appeals, if such a separate document exists or can be prepared.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH A. RUSS, et al.,

THE COVELO INDIAN COMMUNITY OF THE ROUND VALLEY INDIAN RESERVATION,

Plaintiffs, Plaintiff in Intervention, and Appellees,

v.

RICHARD E. WILKINS, et al.,

Defendants and Appellants

FILED

NOV 3 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

Appeal from the United States District Court for the Northern District of California

No. 76-2776

ORDER

Before: BROWNING and HUG, Circuit Judges, and HOFFMAN, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Browning and Hug have voted to reject the suggestion for rehearing en banc and Judge Hoffman has recommended denial of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

Act of October 1,1890; Chap. 1271; 26 Stat. 658

An act to provide for the reduction of the Round Valley Indian Reservation, in the State of California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he hereby is, authorized and directed to cause the agricultural lands in the Round Valley Indian Reservation, in the State of California, to be surveyed into ten-acre tracts, and to allot the same in severalty to the Indians belonging thereon, under the provisions of the act of Congress approved February eighth, eighteen hundred and eighty-seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes:" *Provided*, That he may cause said agricultural lands to be alloted in such quantities and to such classes as he may deem expedient and for the best interests of said Indians: *And provided further*, That a sufficient quantity of said agricultural lands shall be reserved for agency, school, and mission purposes. In addition to the allotments of agricultural lands to said Indians in severalty, there shall be reserved a reasonable amount of grazing and timber lands for their use, to be used by said Indians in common, or the President may at any time, in his discretion, cause the same to be alloted in severalty under the provisions of said act of February eighth, eighteen hundred and eighty-seven, in such quantities and to such classes as he may deem expedient. Said grazing and timber lands shall be selected by a commission of three disinterested persons to be selected by the President.

SEC. 2. That said commission shall appraise the value of any and all tracts of agricultural lands within the Round Valley Indian Reservation, with the improvements thereon, which have become the property of individuals by purchase from the State of California or from persons deriving title from said State, and shall also appraise the value of all improvements made by private persons or firms, before the third day of March, eighteen hundred and seventy-three, upon any of the lands included in the reservation as established under the Act of Congress approved March third, eighteen hundred and seventy-three other than those actually disposed of by said State of California, and within the lands selected and retained for the Indians, under the provisions of this act, and shall report the same to the Secretary of the Interior, who shall cause payment to be made for such appraised lands and the improvements thereon, and also for such improvements as may be located upon the lands selected for the Indians in common, or upon any of the unappraised agricultural lands within the reservation, as hereby established, to the proper owners thereof, out of the money hereinafter appropriated. Upon payment of the appraised value of such appraised lands and improvements, or upon tender of payment, the title to said lands shall become vested in the United States, and all persons to whom such payment or tender of payment shall be made, and all persons claiming through or under them, shall immediately remove from the reservation as herein established, and upon failure to remove within a period of sixty days after said payment or tender of payment, the military forces of the United States, if necessary, may be employed to effect their removal.

SEC. 3. That the remainder of the grazing and timber lands included in the reservation as at present existing shall be surveyed into tracts of six hundred and forty acres each, and the boundary lines of the reserved lands shall be run and properly marked. Upon the completion of said surveys the said remainder of the grazing and timber

lands shall be appraised in tracts of six hundred and forty acres each by a commission of three disinterested persons, to be appointed by the President, which commission shall also appraise all improvements placed upon said tracts before the third day of March, eighteen hundred and seventy-three, and determine the ownership thereof. The said appraisements shall be subject to approval by the Secretary of the Interior. The said lands when surveyed and appraised shall be sold at the proper land-office of the United States, by the register thereof, at public sale, after due notice, to the highest bidder, at a price not less than the appraised value, and not less than one dollar and a quarter per acre. Each purchaser at such sale shall pay the full purchase price at the time of purchase. Any person or persons having appraised improvements upon any of said tracts shall have preference right to purchase the tract or tracts upon which said improvements are located at the appraised value thereof. Upon failure of any such person or persons to purchase a tract upon which his or their improvements are located, said tract and improvements shall be sold at not less than the appraised value, and an amount equal to the appraised value of the improvements shall be paid to the owner or owners of such improvements.

SEC. 4. That the funds arising from the sale of said reservation lands, after paying the expenses of survey, appraisement, and sale, and re-imbursing the United States for payment of lands and improvements, as provided in section two of this act, shall be placed in the Treasury of the United States to the credit of said Indians, and the same shall draw such rate of interest as is now or may be hereafter provided by law, which income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior: *Provided*, That an amount not exceeding one-tenth of the principal sum may be also expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior.

SEC. 5. That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, for the payment of the expenses of the survey, appraisement, and sale of said lands, and for the appraisement of lands, and improvements, and payment of the same.

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

ALEXANDER L. STEV
CLERK

No. 80-1301

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH A. RUSS, et al.,
Petitioners,

vs.

RICHARD E. WILKINS, et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of the Respondents

GEORGE DEUKMEJIAN
Attorney General of the
State of California

R. H. CONNETT
Assistant Attorney General

RODERICK WALSTON
Deputy Attorney General

CHARLES W. GETZ IV
Deputy Attorney General

6000 State Building
San Francisco, CA 94102
Tel: (415) 557-3920
Attorneys for Respondents

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

QUESTION PRESENTED

The question presented is whether the boundaries of the Round Valley Indian Reservation as described in the Act of March 3, 1873, 17 Stat. 633, were reduced by Congress pursuant to the provisions of the Act of October 1, 1890, 26 Stat. 658.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	2
Argument	3
I. The Court of Appeals' Decision Properly Analyzes Congress' Intent in Enacting the 1890 Act, and This Court Should Not Review This Case for the Purpose of Further Examining This Question	3
II. This Court May Wish to Review This Case for the Purpose of Clarifying Its Past Decisions in Reservation Boundary Cases	8
Conclusion	14

TABLE OF AUTHORITIES

Cases

Pages

DeCoteau v. District Court, 420 U.S. 425 (1975) 3, 6, 7, 9, 10, 11, 13

Mattz v. Arnett, 412 U.S. 481 (1973) 3, 7, 8, 9, 10, 11, 12, 13

Puyallup Tribe of Indians v. Department of Game, 433 U.S. 165 (1977) 11

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 3, 9, 10, 11, 12, 13

Seymour v. Superintendent, 368 U.S. 351 (1962) 3, 6

United States v. Washington, 496 F.2d 620, cert. denied, 419 U.S. 1032 (1974)..... 11

United States Statutes

Act of 1905, 33 Stat. 706 9
Act of March 3, 1873, 17 Stat. 633 .....1, 2, 5
Act of October 1, 1890, 26 Stat. 653, 658 .....1, 2, 3, 5, 6, 7, 8
General Allotment Act of 1877, 24 Stat. 388 .....4, 9, 12

Congressional

Committee on Indian Affairs, Rpt. No. 1522, U.S. Sen., 4th Cong., 2d Sess. (Ser. 2274, Feb. 27, 1885)..... 4, 7

Miscellaneous

Cohen, *Handbook of Indian Law,* (U.S. Govt. Printing Off., 1942) 12, 13

No. 80-1301

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH A. RUSS, et al.,
Petitioners,

vs.

RICHARD E. WILKINS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the Respondents

STATEMENT OF THE CASE

In 1973, respondent Wilkins, a fish and game warden of the California Department of Fish and Game, apprehended petitioners Russ and Whipple for violation of California fish and game laws, by killing a deer out of season. Petitioners are enrolled members of the Covelo Indian Community of the Round Valley Indian Reservation in Mendocino County, California. It was stipulated at trial that the deer, which was in petitioners' possession at the time of their apprehension, had been killed on lands which had been added to the Indian reservation by the Act of March 3, 1873, 17 Stat. 633. These lands remained a part of the reservation at least until the Act of October 1, 1890, 26 Stat. 658. The question in the case is whether the latter Act terminated the reservation status of the lands in ques-

tion, and thus whether California has jurisdiction to regulate the Indian taking of deer on said lands.

The history of the disputed lands, and the effect of the 1873 and 1890 enactments, is succinctly described in the Court of Appeals' decision, contained in an appendix attached to the petition for writ of certiorari. See Pet. App. 21-23. Rather than describe these matters further, we incorporate the description provided in the Court of Appeals' decision.

In the proceedings below, the petitioners brought an action for declaratory relief against respondents, and the tribe intervened in support of petitioners. The district court held that the disputed lands were still part of the Indian reservation, and thus that California law was not applicable to the taking of the deer. On appeal, the Court of Appeals reversed, holding that the disputed lands lost their reservation status as the result of the 1890 enactment and thus that Cailfornia law applies to the case.

SUMMARY OF ARGUMENT

The Court of Appeals properly concluded that Congress intended to reduce the size of the Round Valley Indian Reservation by enactment of the 1890 Act. Moreover, this question has no significance beyond the facts of this case. Accordingly, this Court should not review the case for the purpose of further examining this question.

The Court may wish to review this case, however, for the limited purpose of clarifying its past decisions in Indian reservation boundary cases. Although the results of such cases are consistent, the analyses provided in the cases are obliquely inconsistent. The Court, in earlier cases, emphasized the *method* by which Congress disposed of surplus reservation lands in determining the reservation

status of such lands. In more recent cases, the Court has emphasized Congress' *intent* in disposing of such surplus lands, by reference to *all* relevant factors and circumstances; the method of disposal of the surplus lands is merely one of various factors which the Court has considered. The Court may wish to use this case as a vehicle for making clear that the latter approach should be followed by federal courts in future cases.

ARGUMENT

I. THE COURT OF APPEALS' DECISION PROPERLY ANALYZES CONGRESS' INTENT IN ENACTING THE 1890 ACT, AND THIS COURT SHOULD NOT REVIEW THIS CASE FOR THE PURPOSE OF FURTHER EXAMINING THIS QUESTION.

This Court has developed a substantial body of law to guide federal courts in determining whether Congress intended to change the existing boundaries of Indian reservations. See *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Mattz v. Arnett,* 412 U.S. 481 (1973); *DeCoteau v. District Court,* 420 U.S. 425 (1975); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). As enunciated in *Mattz v. Arnett, supra,* the question requires examination of *all* relevant circumstances, including the "face of the Act," the "surrounding circumstances," and "legislative history." 412 U.S. at 505.

The Court of Appeals' decision properly follows and applies the factors described in *Mattz* and other cases. Pet. App. 24-41. The appellate court examined the language and legislative history of the 1890 Act, and the historical circumstances surrounding its enactment. *Id.* The Court properly concluded that, based on all relevant circumstances, Congress intended to reduce the reservation boundaries by passage of the Act. *Id.*

Certain salient points in Court of Appeals' analysis bear emphasis. Congress established a committee in 1884 to

examine the needs and conditions of various California Indian tribes, including the tribe located on the Round Valley Indian Reservation. The committee was headed by Senator Dawes, the later author of the General Allotment Act of 1877, 24 Stat. 388. The committee, after conducting a lengthy investigation, published a report in 1885 noting that most of the lands of the Round Valley Indian Reservation were occupied by non-Indian settlers, Committee on Indian Affairs. Rpt. No. 1522, U.S. Sen., 48th Cong., 2d Sess., at p. 2 (Ser. 2274, Feb. 27, 1885)[1]. The report also noted that the existing reservation was too large to serve the small group of Indians who resided on the reservation, and thus that the federal government was having difficulty in protecting the legitimate needs of the Indians. *Id.* The report commented:

> "[T]he earliest measure should be taken *to reduce the boundaries of this reservation to the present wants of these Indians.* All that are upon it cannot amount to more than seven or eight hundred men, women and children. A few thousand acres of valley lands, with perhaps a small portion of upland for grazing purposes, is all that can be utilized for their benefit. To these needs *the limits of the reservation should be reduced* . . . . At any rate, it is the duty of the government to take these Indians and their reservation in hand, and *after having reduced the reservation* to

1. The report stated:

"Men without authority and without paying anything to the Government have occupied from 90,000 to 95,000 acres of the 102,000 acres constituting the reservation for the last twelve or thirteen years, [and] the Government has been obliged to pay during that time for the support of the few Indians upon the reservation since the year 1873, the sum of $241,975.93, an average of $20,165 a year. This statement itself is a sufficient commentary upon the folly which has marked the administration of this reservation during this time." *Id.* at p. 3.

> their present wants and prospective development and apportioned to each one all his necessities, require the balance of the reservation to be sold and the money put into the Treasury for the benefit of these or other Indians." *Id.* at pp. 7-8. (Emphasis added.)

The report thus clearly indicated that the reservation was larger than necessary to serve the Indians' needs, and accordingly should be reduced in size.

Acting pursuant to the recommendations in the 1885 congressional report, Congress passed the Act of October 1, 1890, 26 Stat. 658. This Act, in its title, expressly stated that its purpose was "to provide for the *Reduction* of the Round Valley Indian Reservation." 26 Stat. 658. (Emphasis added.) Thus, the Act, consistently with the recommendations in the congressional report, reduced the size of the reservation.

If any doubt remains, it is removed by language in the text of the Act. Section 2 of the Act specifically distinguishes between "the reservation established under" the Act of March 3, 1873, and the "reservation, as hereby established." 26 Stat. 658. At another point, section 2 refers to the "reservation as herein established." *Id.* The language of section 3 also emphasizes the distinction between the 1873 reservation and the reservation established by the 1890 Act, stating that "the remainder of the grazing and timber lands included in the reservation as present existing shall be surveyed" into tracts of 640 acres. *Id.* There would be no need to use the qualifying phrase "at present existing" if the reservation were to retain its original boundaries.

Further, the administrative interpretation of the 1890 Act, and subsequent legislation relating to the Act, confirm that Congress meant to reduce the reservation boundaries

in the 1890 Act. These factors are discussed at length in the Court of Appeals' decision, see Pet. App. 35-41, and need not be repeated here.

The petitioners argue that only a small number of settlers actually occupied the lands which were the subject of the 1890 Act, and thus that the "familiar forces" at work elsewhere were not at work at the Round Valley Indian Reservation. Pet. 7-8. The historical circumstances relating to this reservation, however, show that the *existence* of non-Indian settlements, regardless of their size or multiplicity, created a serious management problem that impeded the Indians' own needs. Thus, the size and multiplicity of the non-Indian settlements are of little relevance in determining whether Congress meant to reduce the size of the reservation.

The petitioners also argue that, since the unsold part of the surplus lands were later added to the reservation, a "checkerboard" situation would be created if the surplus lands which *were* sold are no longer part of the reservation. Pet. 16-17. In fact, however, such "checkerboard" situations are common in the West, where many surplus reservation lands lost their reservation status when they were sold to non-Indian homesteaders. See, *e.g., Seymour v. Superintendent,* 368 U.S. 351, 354 (1962) (non-reservation status of lands formerly comprising northern half of Colville Reservation in Washington). Whether Congress was wise in creating such "checkerboard" situations is not before this Court. As this Court commented in *DeCoteau v. District Court, supra:*

> "A canon of construction [requiring ambiguous federal Indians laws to be construed favorably to Indians] is not a license to disregard clear expressions of tribal and congressional intent. Some might wish they had

spoken differently, but we cannot re-make history." 420 U.S. at 449.

Thus, the relevant statutory indicia show that Congress, in enacting the 1890 Act, meant to achieve an accommodation of competing interests. On the one hand, as noted in the 1885 congressional report, a small number of Indians occupied lands that were larger than necessary to serve the Indians' needs, and that were too large to be effectively administered by the federal government. On the other hand, many of these lands were occupied by non-Indian settlers with claims of dubious legality. The logical solution to the problem was to reduce the size of the reservation, allowing the Indians to retain the lands necessary for their use and ending the reservation status of lands that were surplus to their needs. This is exactly what Congress accomplished in enacting the 1890 Act. The objective of the Act, as described both in the 1885 congressional report and the 1890 Act, was a "reduction" of the "reservation," which indicates that Congress meant to solve the reservation's problems by reducing its size. This accommodation gave the most fertile agricultural lands of the reservation to the Indians. It also created a smaller, more manageable reservation for their needs. Finally, it removed the basis for the confrontation between Indians and the white man which was a main obstacle to the Indians' own welfare. The congressional solution was thus ideally tailored to the problem itself.

From the foregoing, it is clear that the Court of Appeals properly applied the test formulated in *Mattz* and other cases, in holding that Congress meant to reduce the reservation boundaries by the 1890 Act. Moreover, this question, which involves a single statute that applies only to a single Indian reservation in California, raises no significant issue

of federal law that applies to other reservations, or that has significance beyond the limited facts of this case. For these reasons, there is no basis for the Court to review the lower decision to determine whether it properly ascertained the congressional intent relating to the 1890 Act. As we explain below, however, the Court may nonetheless wish to review this case for the limited purpose of clarifying its decisions in *Mattz* and related cases.

II. THIS COURT MAY WISH TO REVIEW THIS CASE FOR THE PURPOSE OF CLARIFYING ITS PAST DECISIONS IN RESERVATION BOUNDARY CASES.

This Court's decisions in reservation boundary cases, although harmonious in their results, are not altogether harmonious in their rationale. The Court may wish to use this case as a vehicle for clarifying the rationale underlying such cases.

In *Mattz v. Arnett,* 412 U.S. 481 (1973), this Court considered the effect of an 1892 congressional Act that, following the provisions of the General Allotment Act of 1877, allotted certain reservation lands to Indians, and provided for the opening, entry and sale of surplus reservation lands to non-Indian homesteaders. As noted above, the Court held that all relevant circumstances must be examined, including the language, legislative history and surrounding circumstances of the Act. The Court held, however, that Congress, in "opening" the surplus lands for non-Indian settlement, did not necessarily mean to alter the reservation status of the lands. Finding no other statutory indicia indicating that Congress meant to alter the status of the lands, the Court concluded that the lands remained a part of the reservation.

In *DeCoteau v. District Court,* 420 U.S. (1975), this Court considered the effect of an 1889 agreement between

the United States and an Indian tribe, subsequently ratified by Congress, under which the tribe agreed to "cede, sell, relinquish, and convey" all unallotted, surplus reservation lands to the United States. The Court held that, under this agreement, the tribe surrendered title to the surplus lands to the United States, and the surplus lands were no longer part of the reservation. The Court distinguished *Mattz* on grounds that Congress, in *DeCoteau,* had expressly "ceded" surplus reservation lands to the United States and, in *Mattz,* had merely "opened" the surplus reservation lands for non-Indian settlement. 420 U.S. at 447-449. The Court thus appeared to focus primarily on the *method* selected by Congress for disposing the surplus lands; a "cession" of the surplus lands ended their reservation status, whereas—in the absence of a clearly-expressed intent to the contrary—an "opening" of surplus lands did not.

More recently, in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), the Court appeared to depart from the "method" approach in determining whether surplus lands retain their reservation status, and instead focused on the "intent" approach. In *Rosebud,* the United States and an Indian tribe conducted negotiations that resulted in an agreement in 1901 for the "cession" of surplus reservation lands to the United States, in return for which the United States promised to pay the tribe for the lands. Congress failed to ratify the agreement, however, because it did not want to obligate the federal government to expend funds for this purpose. Instead, it passed an Act in 1905 that "opened" the surplus reservation lands for settlement by non-Indian homesteaders, and further provided that the non-Indian settlers were to pay for the acquired lands.

The 1905 Act, although "opening" the surplus reservation lands for non-Indian settlement, incorporated the lan-

guage of the 1901 agreement that "ceded" the lands to the United States. 430 U.S. at 596. The Act did not actually result in a "cession" of the lands, however, because the agreement was never approved both by the United States and the tribe; the United States had refused to ratify the original agreement that obligated the federal government to pay for the lands, and the tribe had refused to ratify the amended agreement that obligated the non-Indian settlers to pay for the lands. *Id.* at 597. Hence, although the Act employed the "cession" terminology, it effectively resulted in an "opening" of surplus lands for non-Indian settlement.

Notwithstanding, this Court held that Congress, by employing the "cession" terminology, evinced an intent to terminate the reservation status of the surplus lands. It was inconsequential, the Court ruled, that the lands had not been actually ceded to the United States. Justice Marshall, in a dissenting opinion joined by two other justices, argued that since the surplus lands were actually disposed of by the same method as in *Mattz*, the result should be the same. *Id.* at 615. That is, since the surplus lands in both cases had been "opened" for non-Indian settlement, the surplus lands in both cases retained their reservation status. The majority in *Rosebud*, however, held that, regardless of the method selected by Congress for disposing of the surplus lands, Congress evinced its intent with reasonable clarity to terminate the reservation of such lands.

Mattz, *DeCoteau* and *Rosebud* are harmonious if viewed as establishing the rule that, in determining the reservation status of surplus lands, the courts must ultimately examine all relevant factors relating to the "intent" of Congress, including such factors as legislative history and surrounding historical circumstances. The analysis in *Mattz* and *DeCoteau*, however, appears to examine "intent"

by primary reference to the *method* employed by Congress in disposing of the surplus lands. In *Mattz,* the Court held that the "opening" method does not alter the reservation status of the surplus lands, and in *DeCoteau* the Court held that the "cession" method has the opposite effect. In *Rosebud,* the Court appeared to deemphasize the importance of the method selected by Congress, and instead emphasized the importance of examining *all* relevant circumstances. In light of *Rosebud,* the approach taken in *Mattz*—to the extent that it holds that the "opening" method presumptively has no effect on reservation status—may no longer be valid.[2]

The *Rosebud* approach, in deemphasizing the importance of the method selected by Congress, is consistent with historical circumstances relating to the vagaries of the reservation system. The congressional method of disposing of surplus reservation lands depends on factors unrelated to the needs of the Indians themselves. Specifically, Congress initially disposed of surplus reservation lands by paying the Indians tribes for a "cession" of the lands. See *e.g., DeCoteau v. District Court,* 420 U.S. 425 (1975). This approach, however, proved costly to the federal government, for it obligated the federal government to pay for the lands even though they were not resold to non-Indian settlers. Therefore, commencing with the enactment of the

---

2. This conclusion is also supported by this Court's decision in *Puyallup Tribe of Indians v. Department of Game,* 433 U.S. 165 (1977). The Court, in dictum, stated:

> "The Ninth Circuit, relying on our decision in *Mattz v. Arnett,* 412 U.S. 481, held that the reservation did still exist, *United States v. Washington,* 496 F.2d 620 (1974), cert. denied, 419 U.S. 1032. That decision predates our consideration of *DeCoteau v. District County Court,* 420 U.S. 425, and *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977)." 433 U.S. at 173 n. 11.

The implication of this dictum is that *Mattz* is no longer good law.

General Allotment Act of 1877, Congress established the policy of "opening" surplus reservation lands for entry, settlement and purchase by non-Indian homesteaders. See *e.g., Mattz v. Arnett,* 412 U.S. 481 (1973); Cohen, *Handbook of Indian Law* (U.S. Govt. Printing Off., 1942), 334-336. Under the latter approach, the proceeds of the sales were placed in trust by the United States for the benefit of the Indians. This approach relieved the federal government from the obligation of paying for surplus lands. Instead, the obligation was foisted on non-Indian homesteaders who acquired the surplus lands. In short, Congress changed its method of disposing of surplus reservation lands for fiscal reasons, not for reasons related to the needs of the Indians. Accordingly, it is doubtful whether this congressional change of policy should be a decisive factor in determining whether Congress meant to alter the reservation status of the surplus lands.

For the above reasons, the Court may want to review this case for the purpose of clarifying that, as it held in *Rosebud,* the courts must examine *all* relevant factors relating to the congressional intent, and should not pay undue attention to the method selected by Congress for terminating the reservation lands. As explained above, the Court should not take the case for the purpose of ascertaining the congressional intent, since the Court of Appeals' decision properly resolves this issue. The Court may decide, however, that this case presents an opportunity to make clear that the Court of Appeals' decision, in emphasizing intent rather than method, should be followed by other federal courts in future cases.

The resolution of this question may have critical significance in this case. In this case, Congress chose the "opening" method of disposing of surplus lands, rather

than the "cession" method. Therefore, in this sense, this case is like *Mattz*. On the other hand, all relevant circumstances show that Congress meant to "reduce" the size of the reservation, as explained above. In this sense, this case is like *DeCoteau* and *Rosebud*. Therefore, the resolution of the issues in this case depends on whether the Court truly examines all relevant factors in determining the "intent" of Congress, or instead focuses primarily on the method for the disposal of the surplus lands. The Court of Appeals' decision, in following the former approach, is consistent with this Court's recent decision in *Rosebud*.

CONCLUSION

For the foregoing reasons, it is suggested that the Court should decline to review the case for the purpose of determining whether Congress intended to reduce the size of the reservation, but may wish to review the case for the purpose of clarifying its past decisions in reservation boundary cases.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the
State of California
R. H. CONNETT
Assistant Attorney General
RODERICK E. WALSTON
CHARLES W. GETZ IV
Deputy Attorneys General
Attorneys for Respondents